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v. 2783

No. 13653

United States
Court of Appeals
For the Ninth Circuit.

See vol. 2781-2

CHIN LIM MOW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Five Volumes
Volume V
(Pages 1739 to 2127)

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-3-53

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October 8, 1952. 2:00 P.M.

The Court: You may proceed, gentlemen.

FRANK FILICE

resumed the stand.

Cross-Examination
(Continued)

By Mr. Sullivan:

Q. Mr. Filice, I will now direct your attention to exhibit 270, which is a chart prepared in connection with the analysis of certain capital accounts and loans payable of the Elite Company introduced here during the course of the testimony of Mr. Farley. You recall that chart, do you?

A. Yes, I do.

Q. Have you examined that chart during the course of your assistance here as special agent in this case?

A. Yes, I have gone over the material in the chart. I have examined it.

Q. Now, I will direct your attention to an entry of Mr. Farley's under that section of the account which is under his title "Capital contributions," and in the year 1945 Admay Company $15,000. Do you see that there?

A. Yes, I see an entry under "Capital contributions" designated as the Admay Company with a monetary amount of $15,000 in the column headed 12/31/45. [1888]

(Testimony of Frank Filice.)

Q. Now, I believe that you have told us already that you analyzed the bank account of the Admay Company, did you not?

A. All with the exception of two checks that I never saw.

Q. Yes. Did you find during the course of your examination any money going from Admay Company to Elite Company?

A. To the best of my recollection, no, unless it was in those two missing checks.

Q. And what is the amount again can you give me it, of those two missing checks?

A. One check which was cleared at the bank on December 29, 1945, was in the amount of $20,000. Another check which cleared the bank under date December 31, 1945, was $6,000.

Q. Well, now, did your investigation disclose at any time any money going from the Admay bank account to the Elite Company bank account in the year 1945?

A. I found no checks that could have been identified as going from Admay bank account to the Elite Company for the year 1945.

Q. Now, there is testimony in the record, is there not, Mr. Filice, of Mr. Farley's in connection with that exhibit 270 which you have before you, charging the defendant with the $16,000 item which you see there as the capital contribution, do you recall that? A. Yes, I do.

Q. Now, I will put that down underneath the column which I have written on the board, and I will

(Testimony of Frank Filice.)

ask you to be good [1889] enough, Mr. Filice, to add for me the total of these deposits by Mr. Chan in the Admay account of $300; the payments of the children's taxes in the amount of $12,600; the payments of taxes of May Taam in the amount of $1770.67; payments for Hom Yuk Lim's taxes in the amount of $1,743.57; taxes paid on the property which you identified for me as Admay-operated in the sum of $2180.08; and this last item of $16,000. I wonder if you would be good enough to total that column for me? A. (At blackboard.)

Q. What do you find to be the total of that set of figures that I gave you? A. $34,594.32.

Q. Now, Mr. Filice, I will direct your attention to this exhibit which you discussed with Mr. Fleming yesterday, and which I believe is exhibit 334.

Mr. Sullivan: I wonder if I might have these copies distributed to the ladies and gentlemen, your Honor?

The Court: You may.

Mr. Sullivan: I will pass them around (handing documents to the jury).

Q. I believe you told us that you prepared this exhibit under the direction of Mr. Fleming?

A. That is true.

Q. And in the course of the preparation of it you referred to certain evidence that has been introduced in this case, [1890] did you not?

A. Yes.

(Testimony of Frank Filice.)

Q. And in instances you have indicated for reference purposes the exhibit number—I might say in all instances—on the left hand column of the exhibit? A. That is correct.

Q. Tell me, first, what you have as a total in the first column which is classified as "total," tell me what you have as a total at the bottom of the entire exhibit. A. $122,614.17.

Q. Now, I will direct your attention to the first item on the first page of the exhibit which refers to property at 847 Clay Street, does it not?

A. Yes, sir.

Q. Is that one of the properties that you and I discussed this morning, and which is also included on your chart, which is exhibit 275 in evidence?

A. It is.

Q. And I believe you told Mr. Fleming that that is the property that also appears on Mr. James Wiley's exhibit, which is 169 in evidence?

A. I did.

Q. And I think you have told us that the partnership return which you considered in respect to this property is under the name of Hom Yuk Lim, Janet Chan and Chin Lim Mow? [1891]

A. I did.

Q. You identify Janet Chan as the daughter, of course? A. I do.

Q. And you have heard Mr. Shew testify that Hom Yuk Lim is the brother-in-law of Mr. Chan?

A. I recall some testimony of that character, but

(Testimony of Frank Filice.)

I am not entirely clear that he testified he was a brother-in-law.

Q. Now, directing your attention to the next item there, which is on your chart 334, you find also that this property you discussed with me this morning, did you not?

A. That is the second item on the chart?

Q. Yes. A. Yes.

Q. That is property at 112 Waverly Place, is it not? A. That is right.

Q. This appears, also, on the little chart which is exhibit 275 in evidence, does it not?

A. The block chart? Yes.

Q. And the exhibit 17, which is the partnership return of income for this property to which you referred is in the name of Bertha L. Chan and Mar Quong Hing, is that correct? A. That is true.

Q. You have identified Bertha L. Chan as a member of the family of the defendant, have you not? A. I have. [1892]

Q. And I will ask you if you find, or if you recall without looking at the exhibit, that the share of Mar Quong Hing in that partnership was reported upon exhibit 1, the individual income tax return of the defendant?

A. I believe I recall that, yes, sir.

Q. Now, the next property which you have there, 674 Jackson Street, you also discussed that with me this morning, didn't you? A. I did.

Q. And that is in your little chart, which is exhibit 275, is it not? A. It is.

(Testimony of Frank Filice.)

Q. And the partnership return of income which is reflected by your exhibit No. 19, on this exhibit 334, is in the name of Janet Chan and Bertha Chan, is that correct?

A. The one for the year 1945? Yes, sir.

Q. Well, that is what your chart pertains to, isn't it, the year 1945?

A. That is correct. That is correct.

Q. Is that correct? A. Yes, sir.

Q. And, of course, you identify those two ladies as daughters of the defendant, do you not?

A. Janet Chan and Bertha Chan? Yes, sir.

Q. Now, the next item is an item pertaining to the rental [1893] income reported on exhibit 13, is it not? A. It is.

Q. And that is a partnership operation that we discussed this morning, isn't it?

A. I didn't discuss any partnership operation. I discussed a partnership return.

Q. Well, did we touch upon that partnership return at all in our discussion?

A. The partnership return under the name of Admay, yes, sir.

Q. All right. And I think you identified for me the six members of that partnership as all being members of the family of the defendant, did you not?

A. I identified six names there as referring to members of the defendant's family, yes, sir.

Q. Well, what is the difference between what I said and you said?

(Testimony of Frank Filice.)

A. You are assuming it is a partnership. I am not ready to assume that.

Mr. Fleming: Your Honor please I think the question is argumentative.

The Court: Objection sustained. Go ahead with the witness.

Mr. Sullivan: May I have the witness' answer stricken, then, if your Honor please?

The Court: Yes, it may go out and the jury is instructed to disregard it. [1894]

Q. (By Mr. Sullivan): Directing your attention to the next item, which is the fifth item down on your exhibit 334—strike that. Directing your attention to the seventh item down, which is property at 1555 Oak Street, Oakland, that is a property that you discussed with me in testimony this morning, is it not? A. It is.

Q. And exhibit 20, the partnership return of income, is filed under the name of May Taam and Janet Chan Lee, is that correct? A. It is.

Q. And May Taam is the daughter of the defendant, is she not? A. That is true.

Q. And Janet Chan Lee is the daughter of the defendant? A. Yes, sir.

Q. Now, going back to the fifth and sixth items, the property at 148 Waverly Place and the property at 8th and Webster Streets, this pertains to property which you identified as being owned by the defendant according to Mr. Wiley's chart, which is exhibit 169 in evidence, have you not?

A. I have.

(Testimony of Frank Filice.)

Q. And do you find that the rental income of that property was reported on exhibit 23, which is the individual income tax return of Alvin Chan, the son of the defendant? A. I do. [1895]

Q. Now, do you find with respect to all of the other of the first seven items that I have just directed your attention to, the income in the first four items and then the item at 1555 Oak Street, do you find that the partnership income which appears in your column "Total" is reported on a return or returns of the taxpayers who are indicated on the partnership return as partners?

A. May I have the question read, please? It is rather lengthy.

Mr. Sullivan: Well, let me——

The Court: Read it, Mr. Reporter.

(Question read.)

A. I find that the income which was reported on those various partnership returns has been reported by a number of individuals whose names appear on the respective partnership returns, yes, sir.

Q. (By Mr. Sullivan): Now, will you kindly add up for me the first seven items on exhibit 334 by adding the column "total"? In other words, give me a total which represents the first seven.

A. $84,361.70.

Q. Now, if we subtract the eighty-four thousand figure which you have given me from the grand total of your total column figure, what is the

(Testimony of Frank Filice.)

balance? I will do this, and suppose you check it for me, please? [1896] A. $38,252.47.

Q. Now, then, beginning at the next to the last item on the first page of exhibit 34, and going down on the second page, the total amount net of money involved there is $38,252.47, is it not?

A. Yes, it is. As a matter of subtraction, that is correct.

Q. Now, you have included on this chart, have you not, an item in connection with exhibits 186 and 187, introduced by the government, pertaining to the Wai Yuen bonus transactions?

A. I have.

Q. And how much is that? A. $25,000.

Q. Subtract the $25,000 from the $38,252.47.

A. $13,252.47.

Q. So is it correct to say that if we place in one classification that portion of your exhibit which deals with the way the family reported its income, and in another classification this item of $25,000 that is involved in the Wai Yuen bonus problem, what is that on your chart, which is exhibit 334 in evidence, involves only $13,252.47 net?

A. I would say, without passing on the validity of any assumptions, that mathematically that is a correct result.

Q. Now, let's go back and take these other places that you have on your chart.

Mr. Sullivan: Mr. Fleming, if I do this wrong, will you [1897] please guide me here?

(Testimony of Frank Filice.)

Mr. Fleming: You are referring to the blackboard and not the calculations?

Mr. Sullivan: Yes.

Q. Now, let's take the first property which is in line after the first group that I discussed, in other words, the eighth property down on the first page of your list, which is exhibit 334. What do you find to be the address of that property?

A. 159 Waverly Place.

Q. And in your column "Total" what figure have you included as an income figure?

A. $570.22.

Q. And the next item that you have there is what property? A. 34th and Grove Streets.

Q. And what is the figure you have included in your first column for that property?

A. A loss figure, $159.99.

Q. I notice that on your chart you have indicated that in parentheses.

A. That is correct.

Q. And that indicates a loss? That is an accountant's way of designating a loss, isn't that correct? A. Either that or red figures.

Q. Yes. Now the next figure, what property is that? [1898] A. 385 Eighth Street, Oakland.

Q. And what figure do you find on your chart?

A. $2,089.42.

The Court: Pardon me, Mr. Sullivan. Mr. Hubner, do you have a copy of that exhibit?

The Witness: Here is one, your Honor.

(Testimony of Frank Filice.)

Mr. Sullivan: I am sorry, your Honor, I should have given you one.

The Court: Thank you very much.

Q. (By Mr. Sullivan): Now, the next property, what property is that?

A. Hobart and Telegraph, a loss figure, $1,016.94.

Q. And the next property? [1899]

A. A loss figure.

Q. Oh, I'm sorry.

A. 23rd and Broadway, a loss figure, $4,761.15. A loss figure.

Q. And the next figure—the next item, Mr.——

A. Pierce Building, $247.79.

Q. Now, I will ask you to go down to the next —to the last item and pick up this Lions Den for me. You find a profit figure there?

A. Kwo Hing Wah, the computed figure based on one-half of the total, $1,864.93.

Q. Now, I wonder if you would be good enough, Mr. Filice, to save time, I know it involves a double addition here, I will give you what we have calculated to be the net figure for all of these profits and losses for the seven properties, and we arrive at the figure of $1,165.72, and it is a loss figure.

A. I am sorry, Mr. Sullivan, that figure 570.22, it should be, instead of $572.22.

Q. You go ahead and check that and I will change it.

A. Taking the segment of the exhibit that reflects the figures that you have listed on the black-

(Testimony of Frank Filice.)

board and giving effect to the loss figures as deductions against the income figures, the net result, as computed, is a loss figure of $1,165.72. [1900]

Q. Now, I will direct your attention to these properties which I have asked you to calculate the net loss for me on; 159 Waverly Street, did you find in examining the evidence that that figure of $570.22 was reported on the income tax return of Yee Shew Lung? A. I did.

Q. You did not find that it was reported on the tax return of any of the members of the family we discussed in connection with these other properties?

A. No, it was reported on the return of Yee Shew Lung.

Q. 34th and Grove Streets you found reported on the tax return of Yee Shew Lung and not on any member of the family, did you not?

A. That is true.

Q. 385-8th Street, you found reported upon the tax return of Mark Sena and not on any member of the family? A. That is correct, also.

Q. Hobart and Telegraph, a loss, you found the item of loss reported on the tax return of Mark Sena and not on any member of the family?

A. That is also correct.

Q. 23rd and Broadway, with the exception of a sixth reported by Norma Wong Chan, a sixth reported by the defendant on his tax return, you did not find any other portion reported on the tax return of any other member of the family, did [1901] you? Would you like to look at the returns?

(Testimony of Frank Filice.)

A. I would like to see the return of Norma Wong Chan.

Q. First of all I will show you Exhibit 21, which is the partnership return of income, and then Mr. Clerk, may I please have 24? Thank you. Then I will show you the Exhibit 24, Mr. Filice.

A. Mr. Sullivan, my recollection, refreshed by the photostatic copy of the return filed in the name of Norma Wong Chan for the year 1945 is that no part of the loss of $4,761.15 was reported by either the defendant—will you strike that, please, Mr. Reporter? I made a mistake.

After having my memory refreshed by seeing a photostatic copy of the 1945 return filed under the name of Norma Wong Chan, I can state that no part of the loss of $4,761.15 reported on Exhibit 21 was reported by any member of the defendant's family except an amount of $793.52 on the defendant's income tax return and an amount of $793.52 on the return of Norma Wong Chan, both losses.

Q. Now, the Pierce Building, do you find that one-half of that income is reported on the defendant's Exhibit, 1945 tax return?

A. I do not have the defendant's 1945 tax return before me, but my recollection is that it was reported.

Q. And do you recall from your examination of the exhibits in this case that the balance of the net income of the Pierce [1902] Building was not re-

(Testimony of Frank Filice.)

ported by any other member of the family?

A. Yes, because I recall that it was reported on the return of Evelyn Lee Chang.

Q. And her husband?

A. And her husband.

Q. And referring you to the last property, Kwo Hing Wah, what do you find from your examination of the exhibits in evidence as to whether or not that was reported on any income return of any member of the family?

A. I have no recollection of any of that amount being reported on the returns of any members of the defendant's family.

Q. Now, Mr. Filice, since I have ended up with a loss figure and in order to make the reconcilement to your total up at the top, should I add that $13,252.47?

A. Mr. Sullivan, you're maneuvering the computation. I don't know what you are driving at, I will leave it up to you.

Q. All right, then suppose you add for me the loss figure to the $13,250?

A. Add it as a positive figure or as a negative figure?

Q. Add this, don't make what you call an algebraic addition but make an arithmetic addition.

A. Thank you. May I have your chalk please? I believe that's right. [1903]

The Court: Mr. Sullivan, I think you are slipping, making Mr. Filice do all the calculations; you used to do them yourself.

(Testimony of Frank Filice.)

Mr. Sullivan: Well, your Honor, I don't know whether that is due to a lassitude or a resignation of competency.

The Court: Well, it may be.

Q. (By Mr. Sullivan): Mr. Filice, now I will direct your attention to an item which you have on your Exhibit 334 which is headed Wai Lee Company and makes reference to an Exhibit 222 in evidence.

May I have that, Mr. Clerk?

Q. I will show you Exhibit 222 and ask you if this is the document that you referred to when you incorporated this item in your return—in your chart? A. It is.

Q. Now, will you kindly turn to the reverse side of that document and read for me the amount of partners' shares as indicated on that for the defendant Chin Lim Mow?

A. Chin Lim Mow, $436.95.

Q. And I will also direct your attention to the next item, which is the Elite Company, and I will ask you to look at Exhibit 270, which I think I have already given you, and I will ask you to refer to Mr. Farley's Chart of the capital contributions in that exhibit and read for me the amount of capital contribution at December 31, 1945, opposite the name [1904] Bock Chan?

A. I find only one item in the 1945 column of $8,000.

Q. And if it is developed in the evidence that the Elite Company paid a five per cent dividend cal-

(Testimony of Frank Filice.)

culated on that $8,000 investment, can you tell us how much five per cent of $8,000 is?

A. You're asking me to make an assumption now as to the payment of the dividends?

Q. Exactly. A. That would be $400.

Q. Do you have Exhibit 1 before you there?

A. I don't think so, Mr. Sullivan.

Q. Well, you recall, do you not, a reporting of income by the defendant on Exhibit 1?

A. I have it on the chart, $400.

Q. $400. Now, the item of the Wai Lee Company and the item of the Elite Company are included, are they not, in this $14,418.19 figure which I have written on the board?

A. Yes, because we start with the total of 122 and part of that——

Q. And if I—can you give me the total of the Wai Lee Company entry on your first column?

A. $2,000.

Q. The Elite Company item?

A. $2,347.97 and $11,163.32. [1905]

Q. And the total of that I find to be some $13,511.19. Like to verify that?

A. The last figure should be $11,163.32 instead of 22, making your total, I believe, 29 cents. I have $13,511.29.

Q. Now, that total represents the two items we have discussed in this law case involving the reporting of income of the Wai Lee Liquor Company and the Elite Company, is that right? A. Yes.

(Testimony of Frank Filice.)

Q. Now, we have only three items left, have we not, the twenty bank accounts? What do you have opposite that in your total column?

A. $589.40.

Q. And we have an item of Hing Wah Tai, do we not? A. That is true, $317.50.

Q. So there are only two items left, is that right? Now, the item there of $589.50 has come off of a chart which has been prepared after an examination of the ledger accounts at the Bank of Canton, is that correct? A. That is correct.

Q. And that is an item of interest on savings accounts that does not appear on the defendant's tax returns, is that right. A. No, it does not.

Q. Well, in making your calculation did you find any items [1906] of interest to take the same classification that the defendant paid that he didn't claim as a deduction?

A. You mean in the preparation of this chart?

Q. M-hm.

A. This chart was prepared under the instructions of Mr. Fleming and it was limited to the material that he gave me instructions on.

Q. Well, did you in the course of your investigation of this case come upon any items of interest paid out by the defendant which he didn't claim as a deduction on his tax returns?

A. My investigation, and that of Mr. Farley and that of Mr. Freeberg, was concerned principally in

(Testimony of Frank Filice.)

finding the wealth of the defendant and only secondary specific items of deductions that he may or may not have omitted. Therefore, I have no clear recollection of any omitted additions of interest that he may have paid.

Q. Well, let me get you straight. In this chart, which is Exhibit 334, you are not talking about an asset, are you, when you talk about the item of $589.40?

A. I certainly am, because that was credited to the accounts and it constituted an asset, the accretion of interest was an asset.

Q. It didn't constitute your knowledge of an asset at the end of the year in its present form in this account, did it? [1907]

A. Well, if the interest had not been withdrawn during the year it certainly would have been an asset.

Q. But that would be taken up in another calculation, wouldn't it?

A. That is correct, and as I explained, this particular tabulation was prepared under instructions from Mr. Fleming and as to the material that went on it and the classification that was to be given to the material, I merely acted under instructions.

Q. Well, we have $14,418.19 of items involved in this lawsuit which we have calculated down from a total of $122,614.1? and we have those items here that we are talking about, namely, the twenty bank accounts, the Hing Wah Tai, which amount to some $900, and we have the items over here, the Wai Lee

(Testimony of Frank Filice.)

and the Elite Company which amount to some $13,-500. Do you see those? A. I do.

Q. Now, one of those items that I just mentioned you have described on your chart, have you not, as income omitted by the defendant, namely, the 20 bank accounts? A. I have.

Q. My question is: In the course of your investigation did you come across any deductions that the defendant omitted?

A. My answer would have to be the same as the answer that I have already given, Mr. Sullivan. We were concerned primarily [1908] with finding the defendant's wealth and we had difficulty enough tracing specific items on the returns. I have no clear recollection of any omitted item of interest deduction.

Q. Well, I will hand you Exhibit 249 and, Mr. Filice, I will also hand you Exhibit 250 which are the Government's Exhibits in evidence. Now, are you familiar with these documents? A. I am.

Q. I notice that they are addressed—both certificates, and they are addressed to the special agent; is that you?

A. Well, I presume that it was only a matter of convenience for the delivery in the court room during the first trial.

Q. Was it you? A. It would be, yes, sir.

Q. What do you mean by "it would be"? Is it or is it not?

A. Well, as a matter of fact, Mr. Sullivan, this is the first time that it has been called to my at-

(Testimony of Frank Filice.)

tention that the term special agent appears on the certificates. I assume it would be me.

Q. You don't know whether that is you or not?

A. Considering that I was the only special agent during the first trial, it would be me—it should be me.

Q. It is you?

The Court: All right, it is. We will assume that.

Q. (By Mr. Sullivan): Now, I will ask you to examine Exhibits [1909] 249 and 250 and tell me whether—strike that.

What do these documents represent? Will you just tell us generally so the ladies and gentlemen will know what we are discussing?

A. Well, the form itself carries the heading of certificate of assessments and payments, and then it has the additional information, income and estimated tax, years indicated below.

Q. Now, do you find that Exhibit 249 pertains to the payments made on account of the tax liability of the defendant?

A. Yes, his name appears on the top, Chin Lim Mow.

Q. And do you find that Exhibit 250 pertains to the payments made by Chin Wong Shee, the defendant's wife?

A. Yes, her name appears on the top of the form.

Q. Now, do you find, by examining 249 and examining 250, that both the defendant and his wife in the years 1943 and 1944 paid interest to the

(Testimony of Frank Filice.)

United States Government amounting to approximately $26,000?

A. That is true. But I notice further they paid penalties as well.

Mr. Sullivan: I move to strike that, if your Honor please.

The Court: The motion is granted; not responsive to questions. The jury is instructed to disregard it.

Mr. Sullivan: Your Honor, please, I would like to make [1910] an assignment of misconduct against the plaintiff in the case by its agent, the special agent on the stand for making that volunteer statement and I ask, respectfully, that the witness be admonished and the jury be instructed——

The Court: The request will be denied.

The Witness: I am sorry, your Honor.

I do find charges for interest on these forms, yes, sir, Mr. Sullivan.

The Court: Let us take the recess at this time, ladies and gentlemen, and you may consult your associates, Mr. Sullivan. Take the recess for a few minutes, ladies and gentlemen.

Pardon me, we have gotten along a little bit further than I had anticipated and so therefore we will not hold an evening session tonight, but I ask you to hold yourselves in readiness for tomorrow night and possibly Friday night.

I mention this to you now so that you may make any necessary phone calls which you may require, and you may have the facilities of my office outside

(Testimony of Frank Filice.)

to make any necessary calls. We will not have a session tonight.

Mr. Fleming: May I inquire, your Honor, how long you plan to run this afternoon?

The Court: Until 4:30.

(Short recess.) [1911]

Q. (By Mr. Sullivan): Mr. Filice, I will hand you exhibit 7, which is the 1944 return of the defendant, and exhibit 8, which is the 1944 return of his wife, and I will ask you to examine those and tell us if you find on there any deductions for interest paid upon taxes or tax liabilities?

A. The return isn't entirely clear on that score, Mr. Sullivan. I notice that it has a main heading of "Deductions," subheading of "Interest," then one, two, three, four items underneath it. One is labelled "Accounting services," and I assume that could not refer to interest. There is another one labelled "California State Income Taxes." I assume that, likewise, cannot refer to taxes. So I can only assume the interest refers to the first two items.

Q. And what are those two first items?

A. Sun Life Insurance Company, $450.64, and Manufacturers' Insurance Company, $264.15.

Q. Yes. My question is, do you find any amount on those returns, exhibits 7 and 8, representing a deduction for interest paid on account of tax liabilities? A. Federal income taxes?

Q. Yes. A. No, sir.

Q. And I will show you exhibits 5 and 6, being

(Testimony of Frank Filice.)

the 1943 return of Mr. and Mrs. Chan, or Chin Lim Mow and Chin Wong Shee, and I will ask you what, if any, amount do you find taken [1912] as a deduction on those returns for interest paid on tax liabilities during the year 1943?

A. I can't tell from the returns, Mr. Sullivan, because under the main heading of "Deductions" there is one item called "Interest" without any further explanation or designation.

Q. And how much was that? A. $503.71.

Q. Do you find any other interest payment taken as a deduction besides that amount you have just given me?

A. I do not. Oh, I beg your pardon, there is some interest under the property schedule, but I assume that applies to bank loans.

Q. I shall show you exhibit 242, which is a document introduced here in evidence by Mrs. Evelyn Lee Chang. Do you recall that document?

A. I recall its being introduced in evidence and its being testified to.

Q. I wonder if you would be good enough to read me the first paragraph of that document.

A. "When the United Food Supply Company fell each share lost $16,062.29, but I put up $40,000 to the company at that time, which removes my lost share. Mr. Howard Chang owes us $23,937.71."

Q. Now, I will ask you if you recall Mrs. Chang's testimony in this case to the effect that the United Food Supply Company [1913] was a building that collapsed in 1944? Do you recall that?

(Testimony of Frank Filice.)

A. I believe I recall her testimony, yes, sir.

Q. I will ask you to examine exhibits 7 and 8, being the 1944 returns of Mr. and Mrs. Chan, or Chin Lim Mow and Chin Wong Shee, and tell me if you find on there any deduction in an amount which you have just read to us in connection with the collapse of a building pertaining to the United Food Supply Company? A. I do not.

Q. Mr. Filice, this morning at the beginning of my questions to you I asked you a number of questions as to whether you had examined the books and records of a number of companies; and so that we may have the names before us I will read them to you again: Tai Sun Company, Western Supply, United Trading Corporation, United Food Supply, Wai Lee Company, Quo Hing Wah, Hing Wah Tai, and American Four. Do you recall those questions?

A. I do.

Q. So that I may have it clear, did to your knowledge either Mr. Freeberg, who was your assistant, or Mr. Farley, the revenue agent who worked with you as a team, examine any of those books?

A. Mr. Freeberg I am sure did not. Mr. Farley may have. Mr. Wiley very likely did.

Mr. Sullivan: No further questions.

Redirect Examination

By Mr. Fleming:

Q. Mr. Filice, directing your attention to [1914] the items of $122,614.17 which you added up in

(Testimony of Frank Filice.)

that exhibit, I will ask you what year that refers to?

A. The year 1945.

Q. Now then, you were asked several questions by Mr. Sullivan with respect to interest paid. Those were years—do you remember those questions, the very last question, almost, before the recess?

A. They related to the years 1943 and 1944.

Q. Now, you were also asked about the Admay checks, do you remember that, and the investigation in connection with those checks?

A. Yes, I do.

Q. To the best of your knowledge, who has those checks?

A. W. A. Wallace and Company, with the exception of certain checks that I believe Mr. Wallace testified were delivered to some member of the defense.

Q. Have those checks ever been shown to the government, to your knowledge?

A. No, sir. I have made repeated requests for production of those checks. They were never produced.

Q. Directing your attention now to another subject, do you remember this morning Mr. Sullivan put a series of figures on the board? The first one was $20,000, do you recall that?

A. Yes, I think I recall the series you have in mind, Mr. Fleming. [1915]

Q. Do you remember the first one was $20,000?

A. Yes, I do.

(Testimony of Frank Filice.)

Q. Identified by Mr. Sullivan as Admay cash?

A. Yes. They were the checks issued from the Admay Company bank account that were deposited in the personal bank account of the defendant.

Q. Now, I will ask you—I will go over this series of figures again, and I will—now, what was that $20,000? I mean, what was that supposed to represent?

A. That represented checks drawn and charged to the bank account carried under the name of Admay Company in the amount of $20,000, which were deposited in the personal bank account of the defendant.

Q. Well, does that represent Admay cash deposited in the bank account of B. H. Chan?

A. Not cash, but checks drawn against that account.

Q. What year? A. 1945.

Q. So that that figure then represents checks from one bank account to another?

A. That is correct.

Q. Now then, do you recall also being given a figure by Mr. Sullivan of $10,655.38?

A. Yes, I recall that figure.

Q. What was that figure, will you tell me? [1916]

A. That figure, as I recall it, was the total of a group of figures representing the net income reported on three or four different partnership returns for the year 1945.

Q. Is that a tax return figure? A. Yes.

Q. Now, those figures you have testified differed

(Testimony of Frank Filice.)

from the amount of money actually paid out from those operations during the year 1945, did they not?

A. May I have the question read? I am not sure that I understand it.

The Court: Read the question, Mr. Reporter.

(Question read.)

A. Yes. There is no—there is no identity between the figure of $10,655.38 and the money that was actually paid out as a result of those profits reported.

Q. (By Mr. Fleming): Do you recall a third figure of $4,322.71? Do you recall being given that third figure by Mr. Sullivan? A. Yes, I do.

Q. And what was that figure supposed to represent?

A. That figure, as I recall it, was a total of depreciation allowances claimed as deduction on the various partnership returns that make up the net income figure reported at $10,655.38.

Q. Is that a bookkeeping figure?

A. Yes, I would say so. It is, however, a deduction allowed by the Internal Revenue office. [1917]

Q. Were those the figures Mr. Wallace testified he calculated on these various returns?

A. I believe Mr. Wallace testified to those figures, yes, sir.

Q. And when you add those up, what do you get?

A. Roughly, $38,000.

Q. Well——

A. I beg your pardon. Roughly, $34,800.

(Testimony of Frank Filice.)

Q. Eight hundred seventy-nine dollars and nine cents? A. That is right.

Q. What does that figure represent?

A. Well, that figure, taken together, really represents an addition of three figures that are dissimilar in character, in my opinion doesn't represent anything.

Mr. Sullivan: May it please the Court, I move to strike out "in my opinion doesn't represent anything."

The Court: Motion is granted. The jury is instructed to disregard what his opinion is.

Q. (By Mr. Fleming): Can you add taxes, income and depreciation and arrive at any logical figure?

Mr. Sullivan: Objected to, if your Honor please, as calling for a conclusion and opinion of the witness.

The Court: Objection overruled.

A. I am testifying as an account and former Internal Revenue agent, and my answer would have to be no.

Q. (By Mr. Fleming): I direct your attention to Admay and [1918] the account 20. You recall yesterday testifying in some detail through analysis, Mr. Filice, of how the money got into the Admay account and how it left the account? A. Yes.

Q. I will ask you if at my request you summarized or added together the payments from the hotels, four in 1944 and five in 1945, and arrived

(Testimony of Frank Filice.)

at a consolidated figure for those payments into the Admay bank account during those years? Just tell me whether you did that?

A. Yes, I did that under your instructions, Mr. Fleming.

The Court: May I interrupt? I understood you to say that you were testifying as a former revenue agent. Are you presently connected with the Bureau?

A. Yes, but I am not a special agent, your Honor.

The Court: Oh, I see. There was some doubt in my mind when you said a former agent of the Bureau.

A. I was originally commissioned as an Internal Revenue agent and served in that capacity for 13 years, then I was transferred four years ago and have since been designated as a special agent.

The Court: With the Intelligence Unit?

A. Yes.

The Court: And you are so associated now?

A. That is true, your Honor.

The Court: All right. [1919]

Q. (By Mr. Fleming): Before we go back to Admay, will you give me the names—well, I will ask you this: Those four hotels were operated in 1943, 1942, 1941, were they not? Directing your attention to the Sherman Hotel.

A. The papers I have before me, Mr. Fleming, concern themselves only with the years 1944 and 1945. There may have been some changes in

(Testimony of Frank Filice.)

the number of hotels between these two years and the earlier years, 1941 and 1942.

Q. Well, I will show you the Sherman Hotel book.

A. I am sure three of those, however, were in operation in the earlier years.

Q. I will show you exhibit CN and ask you to find the check register for the year 1943, directing your attention to page 36. Do you have that page?

A. Yes, I find the record of checks drawn for the year 1943.

Q. In the month of January, 1943, do you find a check payable to B. H. Chan for $700?

A. I do.

Q. And directing your attention to the month of February, 1943—fifth of the month—do you find a check payable to B. H. Chan in the amount of $1,000? A. I do.

Q. How about the following month, directing your attention to the fourth of the month?

A. I find check No. 819 entered as drawn in favor of B. H. [1920] Chan for $1,000.

Q. How about the next month, directing your attention to the 5th of the month?

A. I find check No. 88 dated April 5, drawn in favor of B. H. Chan for $1,000. I beg your pardon, the number is 834, but the amount is $1,000.

Q. How about May, 1943?

A. May, 1943, I find check No. 847 dated May 1, 1943, in favor of B. H. Chan, $1,000.

Q. Next month?

(Testimony of Frank Filice.)

A. I find check No. 872 dated June 2, 1943, in favor of B. H. Chan, $1,000.

Q. Next month?

A. I find check No. 896 dated June 6, 1943, in favor of B. H. Chan, $700.

Q. And on August 3rd?

A. I find check No. 906 dated August 3rd in favor of B. H. Chan, $1,000.

Q. How about September?

A. I find check No. 922 dated September 3rd, 1943, in favor of B. H. Chan, $800.

Q. And October?

A. I find check No. 932, no date, drawn in favor of B. H. Chan, $800.

Q. November? [1921]

A. I find check No. 946 dated November 3, 1943, drawn in favor of B. H. Chan, $800.

Q. And December?

A. I find check No. 953 dated December 3, 1943, drawn in favor of B. H. Chan, $1,200.

Q. Now, did you notice any checks—may I have exhibit 68, please?—did you notice any checks in going through that list in the year 1943 payable to May Taam, Janet Chan, Alvin Chan, Bertha Chan or Norman Chan?

A. I confined my scrutiny to checks payable to B. H. Chan. I will have to examine the record again to answer that question. (Examining record.) May I have the question now read, please.

Q. (By Mr. Fleming): Well, do you find any checks in the year 1943 payable to May Taam, Janet

(Testimony of Frank Filice.)

Chan, Bertha L. Chan, Norma Wong Chan or Norman Chan? A. I do not.

Q. Do you find that in the year 1943, examining the return in the name of Admay Company, exhibit 68, the Sherman Hotel income was reported on that return, Admay Company? A. I do.

Q. And what share was reported under the name Chin Lim Mow? A. One-sixth.

Q. I have added up those figures to $11,000, is that correct? A. The figures on the board?

Q. Yes. [1922]

A. $11,100 is what I get by inspection.

Q. Very well. Now, that was for the year '43. I will direct your attention to exhibit 77, signature card for the Admay bank account, and ask you when, according to that account, the Admay bank account was opened? A. January 7, 1944.

Q. Now, going back to the Sherman Hotel books, I will ask you to go through the month of—yes, I direct your attention to January 4, 1944, I guess on page 17, and ask you if you find a check for $1,000 drawn on that date?

A. I do. Check No. 963 drawn in favor of Admay Company, $1,000.

Q. Who is the payee?

A. Admay Company.

Q. Now, I will direct your attention to the month of February, 1944, and ask if you find a check in the amount of $800 drawn on February 5?

A. I do. Check No. 972 drawn in favor of Admay Company, $800.

(Testimony of Frank Filice.)

Q. Will you then go through the rest of the year 1944 and give me the dates and amounts of other checks you find payable to Admay?

A. Check No. 984, March 6, 1944, drawn in favor of Admay Company, $1,000.

Check No. 996, April 3rd, 1944, drawn in favor of Admay Company, $1,000. [1923]

Check No. 1009, May 8, 1944, drawn in favor of Admay Company, $800.

Check No. 1020, dated June 1, 1944, drawn in favor of Admay Company, $1,000.

Check No. 1029, dated June 26, 1944, drawn in favor of Admay Company, $1,000.

Check No. 1042, no date, drawn in favor of Admay Company, $900. It is part of the check register for the month of August, 1944.

Check No. 1052, dated September 2nd, 1944, drawn in favor of Admay Company, $900.

Check No. 1063, dated October 3, 1944, drawn in favor of Admay Company, $1,000.

Check No. 1077, dated November 4, 1944, drawn in favor of Admay Company, $1,000.

Check No. 1086, dated December 2nd, 1944, drawn in favor of Admay Company, $1,500.

Q. Now, if we add up, we get $11,900?

A. I have $11,900 that I previously developed.

Q. Is that all payable to Admay?

A. The check register so indicates, and the checks were deposited in the bank account carried under the name of Admay.

Q. Well, is it correct to say the checks which in

(Testimony of Frank Filice.)

1943 had been made to the name B. H. Chan in the year 1944 were made in the name Admay. [1924]

Mr. Sullivan: I object to that as calling for a conclusion of the witness.

Q. (By Mr. Fleming): According to the books?

Mr. Sullivan: Calling for a conclusion of the witness, assuming something not in evidence; assuming an identity and similarity between the two years.

The Court: I don't know whether you got his amendment to his question?

Mr. Sullivan: Yes, I did, your Honor.

The Court: "According to the books."

Mr. Sullivan: Yes, your Honor. He can quote that, but the witness' conclusion those two payments be the same——

The Court: That is for these twelve men and women good and true to pass on. The objection will be overruled.

Q. (By Mr. Fleming): Well, let me ask you this: Were both sets of payments charged to account 50? A. Yes.

Q. Let's go back to the question I asked you with respect to the Admay bank account starting in January, 1944. Now, I will ask you if you have added up the source of the deposits from the four hotels in 1944 and arrived at one figure?

A. I have.

Q. And those are what? Admay—what are the names of those four hotels?

(Testimony of Frank Filice.)

A. Alpine Hotel, Sherman Hotel, Mandarin Hotel, Bayshore [1925] Auto Court.

Q. What is the consolidated figure of deposits from those four enterprises in the Admay bank account during the year 1944?

A. $38,650 even.

Q. And what is the amount of monies going out during the year 1944 to B. H. Chan?

A. $3,300. [1925A]

Q. And to the John J. Allen trustee account during the year '44, what is the amount going out?

A. $1,030.75.

Q. And to the Gerdon Land Company?

A. $30,548.03.

Q. And you had previously testified, have you not, that those were credited to account 20?

A. The $30,548.03, yes, sir.

Q. Now, when you testified under examination by the defense, you were asked whether any funds from these hotels were traceable to the personal bank account of the defendant. You recall being asked that question? A. I do.

Q. And you replied no, and I believe you were asked the same question again whether or not one penny was traceable to the personal bank account of the defendant, Chin Lim Mow, and you replied no. Do you recall that?

A. Not quite that way, counsel. My recollection is that I was asked were any of the checks issued from the bank account of the various hotels traced

(Testimony of Frank Filice.)

as deposits in the personal bank account of the defendant, and my answer was no.

The Court: May I ask what in the world is that last figure that you have there? I can't read that.

Mr. Fleming: Gerdon Land Company. [1926]

The Court: I don't mean that, the one you wrote under Admay.

Mr. Fleming: Oh, bank account.

The Court: Never know it.

Q. (By Mr. Fleming): Well, now, when you said none of these funds were traceable to the bank account of the defendant, Chin Lim Mow, did you mean in your testimony that none of these funds found their way to his use and benefit?

Mr. Sullivan: Object to that, your Honor, please, on the grounds it calls for a conclusion and opinion of the witness, leading and suggestive in form, the question and answer asked the witness speaks for itself very clearly.

The Court: Will you read the question, Mr. Reporter?

(Question read by the Reporter.)

The Court: Objection will be overruled.

The Witness: I must beg your Honor's pardon, could I have the question read again?

The Court: Will you read it again?

(Question read by the reporter.)

A. I did not. I meant merely that there were no deposits in his personal bank account as such that could be traced directly to the checks issued

(Testimony of Frank Filice.)

from the hotel bank accounts. He may have received considerable benefit through Admay or through credits in Account 20, from the deposits in the Gerdon Land Company, also out of the Admay bank account—— [1927]

Mr. Sullivan: I move to strike——

The Court: The motion is granted, and the jury instructed to disregard the last answer.

Q. (By Mr. Fleming): Now, was it your testimony, then that you found no instance after the year 1943 of Alpine Hotel checks, Sherman Hotel checks, Mandarin Hotel checks, or auto court checks being deposited directly in the bank account of B. H. Chan?

Mr. Sullivan: Object to that as assuming something not in evidence. I didn't interrogate the witness on the '43 transaction.

The Court: Overruled.

Mr. Fleming: Will you read the question?

(Question read by the Reporter.)

A. My recollection is that I found no instance of any checks issued from any of the bank accounts named that were deposited in the personal bank account of the defendant after 1943.

Q. Now, with respect to the year 1945, '45, there were five hotels, and will you give me the consolidated figure of the deposits of checks that went from those hotels into the Admay bank account?

A. Yes, I can.

(Testimony of Frank Filice.)

Q. What was the total?

A. $53,150. [1928]

Q. Does that figure you have given me represent checks of these five hotels deposited in the Admay bank account during the year 1945?

A. It does.

Mr. Fleming: May I have Exhibit 122 please?

Q. Now, during that year did you find any checks going out of the Admay bank account payable to B. H. Chan? A. I did.

Q. And will you give me the dates and the amounts of those checks?

Mr. Sullivan: We object to this as already asked and answered, if your Honor please, this testimony——

The Court: Let him answer it again.

A. Check dated January 24, cleared at the bank on January 24, $18,500.

Q. (By Mr. Fleming): Now, with respect to that check I will ask you if you find an item deposited in the account, the bank account of B. H. Chan, dated January 29, 1945, $18,500?

A. I do.

Q. Do you find that that check was originally presented on January 24, 1945? A. I do.

Q. Now, with respect to the year 1945 then when you testified that not one penny of the money from these hotels [1929] was traceable to the personal bank account of the defendant, Chin Lim Mow, was it your testimony that none of such money ulti-

(Testimony of Frank Filice.)

mately was deposited in the bank account of the defendant, Chin Lim Mow?

Mr. Sullivan: Object to that, if your Honor please, upon the grounds the testimony speaks for itself, it is in the record as being what it is, that the question calls for a conclusion and opinion of the witness.

The Court: Overruled.

Mr. Fleming: Will you read the question?

(Question read by the Reporter.)

A. No, it is not.

Q. (By Mr. Fleming): What do you mean then by your answer?

Mr. Sullivan: Same objection, if your Honor please.

The Court: Same ruling, overruled.

A. I had in mind in my original testimony specific checks from one bank account traceable as deposits in another. The question is put to me now, I believe I am certain I can answer this way, that of the $53,150 that was deposited in this account, consisted of checks drawn from the hotel bank accounts, $18,500 found its way into the personal bank account of the defendant.

Mr. Sullivan: Object to that, if your Honor please, move to strike it, upon the grounds it is a conclusion and opinion of the witness, the witness has really invaded the [1930] province of the jury and has drawn a conclusion that the money over here is the same amount of money that is over

(Testimony of Frank Filice.)

here, there being no tangible evidence in this record it is the identical money.

The Court: Overruled. The motion is denied.

Q. (By Mr. Fleming): Was your previous testimony then with respect to the year 1945 limited to the fact that you found no checks of these five hotels deposited directly in the bank account of B. H. Chan?

A. That is true, it was limited to that extent.

Q. Now, 1945 is the year in which you had the two missing checks in the total of $26,000, is it not?

A. That is correct.

Q. And how much did you trace to the Gerdon Land Company in the year 1945?

A. Directly?

Q. From Admay, Admay checks to Gerdon Land Company?

A. That is directly consisting of specific checks that I saw and examined the endorsement on, $29,-912.26; indirectly consisted of two checks that were never presented to me, the sum of $8,227.99, the total, $38,140.25.

Mr. Sullivan: I move to strike the witness' answer beginning with the word "indirectly" upon the grounds it is an opinion and conclusion of the witness.

The Court: Motion denied. [1931]

Mr. Sullivan: Invades the province of the jury.

The Court: Motion denied.

Q. (By Mr. Fleming): You have previously

(Testimony of Frank Filice.)

testified, have you not, that that money was credited to account 20? A. I have.

Mr. Sullivan: Objected to as leading and suggestive.

The Court: Overruled.

Q. (By Mr. Fleming): Now, then, to summarize your testimony to date, you have identified Admay checks in the year 1944 going to Gerdon Land Company in the amount of $30,548.03, and in the year 1945 in the sum of $38,140.25 which were credited to account 20?

A. That is correct.

Q. Now, let us turn to account 20, please, and showing you the transcript of the ledger of that account 20 I will ask you first of all to give me the balance in that account beginning of the period we have been discussing, that is to say, the end of '43?

Mr. Sullivan: If your Honor please, I object to this line of testimony upon the following grounds: It has already been thoroughly explored by counsel. This is the very line of testimony on this so-called flow of money theory of counsel's that your Honor foreclosed counsel from examining the witness on yesterday.

The Court: I am inclined to go along with the objection. [1932]

Mr. Fleming, would you like to be heard upon that objection? I think that subject has been quite fully developed.

Mr. Fleming: Your Honor, this goes to the testimony of the witness that not one penny of the

(Testimony of Frank Filice.)

moneys from these hotels was traceable to the personal bank account of Chin Lim Mow.

The Court: That has already been testified to.

Mr. Fleming: And this line of inquiry goes to the indirect tracing of the money through these various accounts to the personal account of the defendant, Chin Lim Mow, and to the witness' answer that his answer was limited solely to a direct transmittal.

The Court: The objection will be sustained on the ground it is repetitive.

Mr. Fleming: I would like to develop a slightly different aspect of this, your Honor, which will be very brief.

Q. Now, the balance at the end of 1943 as compared with the end of 1944 in account 20——

Mr. Sullivan: Object to that, your Honor, same objection.

Q. (By Mr. Fleming): ——find an increase or a decrease?

Mr. Sullivan: Same objection, if your Honor please.

The Court: Overruled.

A. I find an increase.

Q. (By Mr. Fleming): Does that indicate that during the [1933] year 1944 more money went into account 20 than went out of it, money or credits?

A. More money and things that are valuable went into that account than were charged to the account, yes, sir.

(Testimony of Frank Filice.)

Q. I will put down the 1944 under account 20, increase.

Now, how about comparing the end of '44 with the end of 1945 and tell me whether that account increased or decreased?

A. I find that the account decreased.

Q. That means that during the year 1945 more money or credits or other items of value went into the account than went out of the account?

A. That is correct.

Q. Now, will you compare 1945 with the end of 1946 and tell me what you find?

A. I find that the amount decreased.

Q. Now, I will use colored chalk for the year 1946, and, finally, will you compare the end of 1946 with the end of 1947 and tell me whether during that period of time you found an increase or a decrease? A. I find a decrease.

Q. Now, you will recall these six checks that I heretofore showed you. I will ask you if you found that all of those checks payable to B. H. Chan and Chin Hing were drawn during the years '46 and 1947? [1934]

Mr. Sullivan: Objected to, your Honor please; that is the very testimony your Honor ruled on yesterday.

The Court: Objection sustained.

Q. (By Mr. Fleming): Mr. Sullivan asked if you looked at the books and records of the American-4 Company. Do you know where those books and records are located?

(Testimony of Frank Filice.)

A. I haven't the slightest idea.

Q. What type of operation is that, can you tell me? A. I haven't the slightest idea.

Q. Did you look at the records of the Chin Company at Emeryville? A. No, sir.

Q. What type of operation is that, can you tell me? A. I have no idea.

Q. Showing you at this time Exhibit 335 for identification, I will ask you if you can identify those as cancelled checks, Hogan & Vest checks, written during the years '44, 1945?

A. Yes, I can.

Q. And what do those payments purport to represent?

A. They are payments made to payees as indicated on the checks out of the rents collected by the real estate agents, Hogan & Vest, from various of the properties as shown on these sheets, namely, 723 Grant, 870-874 Washington, 870-874 Washington again, and 723 Grant. [1935]

Mr. Fleming: Offered in evidence, if the Court please, as Government's Exhibit 335.

The Court: Be received and marked.

The Clerk: Government's Exhibit 335 in evidence.

(Thereupon U. S. Exhibit No. 335 for identification was received in evidence.)

Mr. Fleming: No further questions, your Honor.

Mr. Sullivan: No questions, your Honor.

The Court: You may be excused, or adjourn to your seat.

The Witness: Thank you, your Honor.

(Witness excused.)

Mr. Fleming: The Government will call Mr. Brady.

AUGUSTUS V. BRADY

called by the Government, sworn.

The Clerk: Will you please state your name and occupation to the Court and Jury?

A. Augustus V. Brady.

Direct Examination

By Mr. Fleming:

Q. And what is your address, Mr. Brady?

A. 2522-44th Avenue, San Francisco.

Q. By whom are you employed?

A. Bureau of Internal Revenue.

Q. How long have you been with the Bureau of Internal [1936] Revenue?

A. Oh, I have been approximately 27 years.

Q. In what capacities have you been associated with the Bureau?

A. Past five years I have been assigned to the Penal Division as a technical adviser. Prior to that time I was with the Internal Revenue Agent's office, served as an internal revenue agent for approximately 22 years.

Q. Now, what is your profession?

A. Accountant.

Q. And what are your qualifications as an accountant?

A. Well, going back to my schooling?

Q. Please.

A. I attended New York University for some

(Testimony of Augustus V. Brady.)

time, and then I took numerous correspondence courses issued by the Bureau, and also by Pace & Pace Accounting School, New York.

Q. And have you heretofore qualified as a public accountant? A. Yes, I have.

Q. Have you on prior occasions testified as a witness in the United States District Court?

A. Yes, I have, sir.

Q. Have you on prior occasions been qualified as an expert in the field of accounting in these courts? A. Yes, sir, I have.

Q. Did you work on the investigation of the taxes of the [1937] defendant, Chin Lim Mow?

A. No, I did not.

Q. Have you, however, been either in attendance at the trial and read the transcript of the testimony of the proceedings in this court since September 8th? A. Yes, sir, I have.

Mr. Fleming: Now, I will ask at this time that there be marked as Government's Exhibit next in order a document headed computation of tax.

The Clerk: 336 for identification.

(Thereupon document referred to was marked U. S. Exhibit No. 336 for identification only.)

Q. (By Mr. Fleming): Now, Mr. Brady, we have had some discussion with respect to the progressive nature of taxation, and I will show you Government's Exhibit 336 for identification and ask you if at my request you made certain calcula-

(Testimony of Augustus V. Brady.)

tions designed to show the progressive nature of income taxation? A. Yes, I have.

Q. Do you also have in front of you Exhibit 65, or a copy, being the instructions for the income tax form for the year 1945? A. Yes, I have.

Q. Have you then for illustrative purposes made a computation of the tax on the form of $60,576.13 in two different manners?

A. I have on the $69,576.13. [1938]

Q. And where did you secure that figure?

A. I believe that figure came from the Exhibit 13, which was the income for the Admay return——

Q. The return for the year 1945? A. Yes.

Q. Now, did I first ask you to calculate the tax on that figure broken down as between two people, that is, husband and wife? A. Yes, you did.

Q. And did you do so taking standard deductions in making that calculation?

A. Yes, sir, I did.

The Court: By the way, do you have an extra copy of that so that I can follow it?

Mr. Fleming: Yes, your Honor.

I will offer in evidence the computation for illustrative purposes heretofore marked as Government's Exhibit next in order.

The Clerk: 336.

Mr. Sullivan: Objected to, if your Honor please, upon the grounds that this exhibit represents assumptions and predicates of fact which are not in evidence.

(Testimony of Augustus V. Brady.)

The Court: I am inclined to admit it so the Jury may have the benefit of the computations therein contained. They are the exclusive judges of the facts in the case. [1939]

The Clerk: Exhibit 336 in evidence.

(Thereupon U. S. Exhibit No. 336 for identification only was received in evidence.)

Q. (By Mr. Fleming): Now, in making computation of tax payable on this figure did you first calculate, did you first of all limit your calculations solely to this amount in calculating the reported income? A. Yes.

Q. Did you first calculate what the tax would be as reported by two people, husband and wife?

A. Yes.

Q. Now, what was the total tax payable in accordance with that calculation?

A. $32,271.76. Want me to explain how I got that, Mr. Fleming?

Q. No. Now, did you subsequently take the same amount of income, that is, $69,576.13, and calculate it as reported by three married couples and three single persons?

A. Using the standard deduction, yes, I did.

Q. Well, when you calculated the tax that way —I will put down here eight people—what was the amount of the tax? A. $16,701.63.

Q. How do you account for the difference?

Mr. Sullivan: Objected to, if your Honor please,

(Testimony of Augustus V. Brady.)

calling for a conclusion and opinion of the [1940] witness.

The Court: Overruled.

A. The difference is between $32,271.76 and $16,-701.63, I have, is $15,570.13. Asked how, what accounted for the difference?

Q. (By Mr. Fleming): Yes.

A. Because the rate of surtax is higher on dividing the income by two rather than dividing it by eight people.

Q. And does that rate progress as the income grows larger?

Mr. Sullivan: Objected to as calling for a legal opinion.

The Court: Overruled.

A. Yes.

Q. (By Mr. Fleming): Now, will you examine Exhibit 65—I believe you told me you have a copy in front of you there? A. Yes.

Q. And tell me what the surtax rates are on an income of $10,000?

A. The surtax on $10,000——

Q. Well, I will reframe my question. On the amounts in excess of $10,000. A. All right.

Q. What is the surtax rate?

A. Well, it would be $2,640 plus 39 per cent of the excess over $10,000. [1941]

Q. The excess over $10,000 is what per cent?

A. 38 per cent.

Q. Now, will you tell me what the surtax rate is on the excess over $50,000?

(Testimony of Augustus V. Brady.)

Mr. Sullivan: Now, your Honor, I object to this testimony as extremely cumulative and repetitive, this very testimony was gone into by counsel with Mr. Wiley, the former Government agent. It was not something which your Honor was including upon the admission of Exhibit 336. The document which counsel has in his hands is the very document he held when he questioned Agent Wiley. I submit that in the interests of time as well as upon the basis of my objection that counsel should not be permitted to ask these questions again.

Mr. Fleming: I only have two more questions, your Honor.

The Court: Overruled.

Q. (By Mr. Fleming): What is the rate on the excess over $50,000?

A. 75 per cent of the excess over $50,000.

Q. 78 per cent? A. 75 per cent.

Q. Now, what figure do you find on the excess over $100,000?

A. 89 per cent of the excess over $100,000.

Q. And finally I will ask you what figure you find on the excess over $200,000?

A. 91 per cent of the excess over $200,000. [1942]

The Court: Just translate that for us into terms which we can all understand.

The Witness: All right. Well, your Honor, as the income increases the rate of surtax increases. For instance, if a person had an income of, say, $11,000, the excess over $10,000 would be 38 per cent.

(Testimony of Augustus V. Brady.)

If he had an income of, subject to surtax, of $51,000, the excess over $50,000 would be at 75 per cent.

If he had an income of $101,000, the excess over $100,000 would be taxed at 89 per cent. And if he had an income in excess of $200,000, subject to surtax, that is, after the exemption, would be at 91 per cent. So it is a graduate rate based upon the income.

Q. (By Mr. Fleming): Is there additionally a normal tax in addition to the surtax?

A. Yes, a normal tax of 3 per cent is constant, regardless of the amount.

Q. Add 3 per cent to all those figures?

A. Yes, that is not at a graduated rate as surtax is.

Q. I will ask you at my direction and under my instructions you have prepared certain charts and tabulations based on the evidence in this trial?

A. Yes, I have. [1943]

Q. And did you at my direction make certain calculations and additions and subtractions based on the data given in that treatment?

A. Yes, I have.

Q. Before we go into that data, I wonder if you can tell me what is meant by the net worth method of calculation of income?

Mr. Sullivan: I object to that question, if your Honor please, insofar as the answer calls for net worth as a legal conception as distinguished from an accountancy technique, upon the ground that the

(Testimony of Augustus V. Brady.)

net worth principle is established by the decisions of the Federal Court is made a legal criteria. If the question goes to that, it calls for the witness' legal opinion and conclusion.

The Court: This man is qualified as an expert without objection from you and without questioning him as to his qualifications, so therefore I am inclined to disallow your objection and overrule it. I think this jury would be very much interested in knowing what the net worth basis of computing tax is.

Mr. Sullivan: My objection not only went to this question, as I thought I made clear, your Honor, if the subsequent testimony is not going to be regarding any legal criteria.

The Court: Yes. I am glad you called my attention to that. In other words, his testimony as to what constitutes net worth, ladies and gentlemen, you will regard for what it may [1944] be worth. I will have occasion to instruct you upon that subject and you will take the instructions from me. But you may listen to this expert's testimony and give it the credit to which you think it is entitled. Does that satisfy you?

Mr. Sullivan: Yes, your Honor, that is exactly my position.

A. May I proceed, your Honor?

The Court: Yes.

A. Well, net worth represents the amount that a person owes at any particular date. For instance, say at December 31st 1944, a man may be worth

(Testimony of Augustus V. Brady.)

$1000. That would represent his actual net equity in all assets, minus all liabilities. That is what he is worth, so we call it a net worth. At the end of, say, 1945, he was worth $5,000——

Q. (By Mr. Fleming): Well, if we could stop there, then net worth is merely a fancy phrase saying how rich or how poor somebody is at a given moment, isn't that it?

A. That term could be applied, yes.

Q. How do you calculate income——

The Court: Well, let's pursue that a little further. In other words, on the basis of the $1000 situation that you used——

A. Net equity, yes.

The Court: That is free of all encumbrances and liabilities? [1945] A. Yes.

The Court: Debts?

A. Yes.

The Court: Every kind and character?

A. That is right.

The Court: That is what he owns?

A. That is what he owns. In other words, his house, it may be worth $9,000. If he owes $8,000 on it and that is the only asset he has, $1000 represents his net worth.

The Court: Very good.

Q. (By Mr. Fleming): Do you, then, take what he owns and subtract his debts and arrive at a balance you call net worth? A. Yes.

Q. How do you calculate income based on net worth? But before you answer that question, let

(Testimony of Augustus V. Brady.)

me ask you, in what circumstances do you use the method of net worth to calculate income?

A. The net worth method has been used by the government in numerous cases where the books and records are inadequate to make a proper determination of his income.

Q. Very well. Now, will you tell me how you make the calculation?

A. Well, we would take the net worth at the beginning and end of the period. Say the period would be one year between 1944 and 1945, usually at December 31st. [1946]

Q. Net worth, then, say, at the end of 1944?

A. Yes.

Q. And the net worth at the end of 1945?

A. Yes. Usually at a particular date such as December 31st.

Q. Then what do you do?

A. Then we get the either increase or decrease.

Q. Now, assuming there is an increase, what do you do next?

A. Well, to the increase in net worth we would take into consideration any non-taxable income. For instance, if he sold some property and it was a long term capital gain in which 50 per cent will be recognized as non-taxable income, we would take that into consideration. Or if he received an income which we consider as non-taxable source like personal injury or various classifications of non-taxable income, that would be taken into consideration.

Also, we would take into account any non-taxable

(Testimony of Augustus V. Brady.)

—any non-deductible items such as life insurance, premiums paid, federal income taxes paid, possibly any penalties paid, things of that nature. Oh, yes, and assuming there were no gifts.

Q. Well, Mr. Brady——

The Court: Pardon me, Mr. Fleming. Are gifts taxable?

A. No, not to the recipient, your Honor.

The Court: Not to the recipient?

A. No.

The Court: But to the giver they are? [1947]

A. To the person that makes the gift, he is supposed to file a gift tax return. Not subject to income tax, however.

The Court: Not subject to income tax?

A. Not the principal, no.

The Court: I am not going to give anything away, that is not the purpose of the questions.

Q. (By Mr. Fleming): In the example you have given, suppose a man has a net worth at the end of 1944 of $1,000 and at the end of 1945 of $10,000, will you tell me how you calculate income on the net worth basis from those figures?

A. Well, we consider the increase in net worth is $9,000.

Q. What do you do with that?

A. Well, we would have to analyze the increase in net worth, Mr. Fleming, to see that there were no gifts, no non-taxable income involved.

Q. Assume that is so?

A. Assuming no gifts and no non-taxable income,

(Testimony of Augustus V. Brady.)

his increase in net worth would be $9,000, to which we would add any non-deductible items such as federal income taxes paid, life insurance premiums paid, and items of that nature.

Q. And how would you calculate the income?

A. Well, we would add to the increase in net worth these non-deductible items, arrive at the taxable income.

Q. Well, now, in this case, and in the absence of any of the complicating factors which you have mentioned, do you [1948] calculate an income of at least $9000 in that particular case?

A. I would like to have that question read, please.

The Court: Read it, Mr. Reporter.

(Question read.)

A. Yes, assuming there was no non-taxable income and no non-deductible items, that would be $9,000 would be his income.

Q. (By Mr. Fleming): And to that would you add his living expenses for the year?

A. Well, the living expenses would be an addition. That would be considered as non-deductible item, which you said assuming there were none. But naturally there would be some personal living expenses that would be added to the increase in net worth. In other words, the money had to come in to go out.

The Court: All right, this might be an appro-

(Testimony of Augustus V. Brady.)

priate time to take an adjournment, ladies and gentlemen. It has been a long day.

Mr. Fleming: If your Honor please, I have a number of exhibits which Mr. Sullivan would probably like to look at. If I could have them marked now, I could furnish him copies.

Mr. Sullivan: Yes, your Honor. I would like to thank counsel for that consideration. We are running against time.

Mr. Fleming: I would like to ask that there be marked for identification a document headed "Summary net worth as of [1949] December 31, 1941."

The Clerk: Government's exhibit 337 for identification.

(Whereupon document referred to above was marked Government's Exhibit 337 for identification.)

Mr. Fleming: A document headed "Detail of Miscellaneous Deposits" as government's exhibit 338 for identification.

The Clerk: Government's exhibit 338 for identification.

(Whereupon document referred to above was marked Government's Exhibit 338 for identification.)

Mr. Fleming: A document 280 for identification, headed "Advances to Wilbur S. Pierce."

The Clerk: Government's exhibit 280 for identification.

(Testimony of Augustus V. Brady.)

(Whereupon document referred to above was marked Government's exhibit 280 for identification.)

Mr. Fleming: Document 281 for identification, headed "Investment in Wai Yuen Club."

The Clerk: Government's exhibit 281 for identification.

(Whereupon document referred to above was marked Government's exhibit 281 for identification.)

Mr. Fleming: A document 282 for identification, headed "Investment in Wai Lee Liquor Store."

The Clerk: Government's exhibit 282 for identification.

(Whereupon document referred to above was marked Government's exhibit 282 for identification.)

Mr. Fleming: A document "net worth statement as of [1950] December 31, 1944 to 1945," as government's exhibit 339 for identification.

The Clerk: Government's exhibit 339 for identification.

(Whereupon document referred to was marked government's exhibit 339 for identification.)

Mr. Fleming: As Government's exhibit 286 for identification, document headed "Details of sales in capital assets."

(Testimony of Augustus V. Brady.)

The Clerk: Government's exhibit 286 for identification.

(Whereupon document referred to above was marked Government's Exhibit 286 for identification.)

Mr. Fleming: As Government's exhibit 340, document headed "Understatement of income based on increase in net worth 1942-1944."

The Clerk: Government's exhibit 344 for identification.

(Whereupon document referred to above was marked Government's exhibit 344 for identification.)

Mr. Fleming: As Government's exhibit 341 for identification, a document headed "Details of fines paid and forfeitures."

The Clerk: Government's exhibit 341 for identification.

(Whereupon document referred to above was marked Government's exhibit 341 for identification.)

Mr. Fleming: As Government's exhibit 287 for identification, a document headed—pardon me, government's exhibit 342, headed "Understatement of income based on increase in net worth year [1951] 1945."

The Clerk: Government's exhibit 342 for identification.

(Testimony of Augustus V. Brady.)

(Whereupon document referred to above was marked Government's exhibit 342 for identification.)

Mr. Fleming: As Government's exhibit 343 for identification a document headed "Schedule of federal income taxes reported on returns for Chin Lim Mow's family for 1945."

The Clerk: Government's exhibit 343 for identification.

(Whereupon document referred to above was marked Government's Exhibit 343 for identification.)

Mr. Fleming: And as government's exhibit 344 for identification, a document headed "Chin Lim Mow's taxable year ended December 31, 1945."

The Clerk: Government's exhibit 344 for identification.

(Whereupon document referred to above was marked Government's exhibit 344 for identification.)

Mr. Fleming: I believe that is all, your Honor. I will furnish copies to Mr. Sullivan.

The Court: All right. Ladies and gentlemen, you have been very patient and I commend you for it. I trust your patience will endure until I conclude this case at the end of this week.

We will adjourn now until tomorrow morning at 9:30. Please remember that—9:30, during which

(Testimony of Augustus V. Brady.)

time, of course, you are admonished again not to talk about the case among yourselves or with others, and not to form or express any opinion concerning [1952] it until it is finally submitted to you. Tomorrow morning at 9:30.

(Thereupon this cause was adjourned to Thursday, October 9, 1952, at the hour of 9:30 a.m.) [1952A]

October 9, 1952—9:30 A.M.

The Clerk: United States of America vs. Chin Lim Mow.

Mr. Fleming: Ready, your Honor.

Mr. Sullivan: Ready, your Honor.

The Court: You may proceed.

AUGUSTUS V. BRADY

was recalled as a witness on behalf of the Government, previously sworn:

Direct Examination
(Continued)

By Mr. Fleming:

Q. Mr. Brady, yesterday we were explaining the net worth method of calculating income. Could you briefly summarize that explanation for us?

A. Yes. As I mentioned, the net worth represents an item or an amount of the man's worth at a particular time, that is, his assets minus his liabilities, net equity in property and assets of all kinds.

(Testimony of Augustus V. Brady.)

We take the net worth at the beginning and end of a certain period, usually one year; for instance, beginning and end of, well, 1945; and we determine whether there is an increase or decrease in his net worth.

Assuming there was an increase in net worth, we would add to that his personal living expenses. Also, we would add non-deductible items and subtract from that non-taxable income [1953] to arrive at the net taxable income for the period. In other words, what he has accumulated, plus items that had been expended that would not show up in his net worth. Is that clear, Mr. Fleming?

Q. Well, first you started with his increase in wealth? A. Right.

Q. And do you add the expenses which you have been able to identify during the period concerned?

A. That is right.

Q. And then do you calculate the sum of those two figures as income, in the absence of other factors?

A. In the absence of any non-taxable income, I would say yes.

Q. I direct your attention to Exhibit 337, for identification, a chart headed "Summary of net worth as of December 31, 1941, Chin Lim Mow." Do you have a copy of that? A. Yes.

Q. Did you prepare that at my direction and at my request? A. Yes, sir, I did.

Q. Is the data which you have summarized in

(Testimony of Augustus V. Brady.)

that chart data which you secured from evidence given at this trial? A. Yes.

Mr. Fleming: Offered in evidence, if the Court please, as Government's Exhibit 337.

Mr. Sullivan: I would like to make an objection, if your Honor please. If your Honor please, we object to the offer in [1954] evidence upon the following grounds: first, the introduction of this exhibit—and I will in probable objection to probable offers of additional exhibits make the same objection—introduction of this exhibit, I submit, lays a foundation for improper examination of the witness who is on the stand for this reason, that Mr. Brady is produced as an expert and the only way to examine an expert is through the medium of hypothetical questions; and if this exhibit is introduced in evidence, Mr. Brady will merely perform the simple function of a reader rather than to answer the proper questions as an expert does through the medium of hypothetical questions.

I submit further that the method of examination is improper in that it is prejudicial. And I submit it is prejudicial because this method of examination will permit the Government witness, Mr. Brady being a Government employee, to draw his own inferences from the testimony and thus to invade the province of the jury.

Thirdly, I submit that this method of examination is improper in character in that it is not a proper examination of a witness in a criminal case, in that through the media of witnesses such as Mr. Brady it

(Testimony of Augustus V. Brady.)

permits the Government to argue the case twice, once through the testimony or spoken word of the witness and at the conclusion of the case by the spoken word of the prosecutor.

With respect to the subject matter of the document, your [1955] Honor, I object upon the grounds that the document is improper and should not be admitted because it is based upon assumptions of fact or inferences from facts which are not in evidence.

And for the foregoing reasons, if your Honor please, I submit the general objection, therefore, that this document which is offered is incompetent, irrelevant and immaterial, prejudicial, and basis for improper examination of the witness.

Mr. Fleming: This document, if the Court please, is offered as a summary of the Government's case, and to explain and illuminate to the jury the mass of data which we have presented here in the last four weeks.

This method has been approved by the Circuit Courts and by the United States Supreme Court. I will direct your Honor's attention to the Schenk case in the Second Circuit, the Gendelman case in this Circuit, and the case of United States against Johnson in the Supreme Court, all of which upheld such method of presentation.

The Court: Objection will be overruled.

The Clerk: Government's Exhibit 337, in evidence.

(Testimony of Augustus V. Brady.)

(Document previously marked Government's Exhibit 337 for identification was admitted into evidence.)

Mr. Fleming: I have copies of this exhibit which I would like to present to the Court and to the jury in order that they may follow the particular chart (handing document to the Court and jury). [1956]

Q. (By Mr. Fleming): Now, Mr. Brady, what is this chart?

A. This chart is a summary of the net worth as of December 31st, 1941.

Q. And what have you attempted to do in this chart?

A. On this chart we attempted to determine the adjusted net worth as of December 31st, 1941.

Q. And do you do that by listing all the assets and liabilities?

A. Yes, in accordance with your instructions and, I would say, based on certain exhibits that have been introduced in evidence during the trial.

Q. What is the date under which you have made this document headed "Summary of Net Worth"?

A. The December 31st, 1941?

Q. Yes. Now, I will direct your attention to the items the first eight items on the chart—first nine items, and ask you the source of that information?

A. The first nine items is shown on Exhibit 58, which was the summary of net worth December 31, 1941, submitted by Chin Lim Mow.

Q. Who signed Exhibit 58?

(Testimony of Augustus V. Brady.)

A. Chin Lim Mow.

Q. Is that notarized?

A. Yes, it is. "Subscribed and sworn to before me this—Oakland, California, 20th day of April, 1942, Ruby Overton, [1957] Notary Public in and for the County of Alameda, State of California."

Q. Will you read the certification on Exhibit 58, please?

A. "I hereby certify this is a full, true and complete statement of my net worth as of December 31, 1941. "Signed, Chin Lim Mow."

Q. What is the total of assets listed on Exhibit 58? A. $264,861.69.

Q. Have you then taken that figure and put it on this chart, together with the nine items submitted by Chin Lim Mow on December 31, 1941, going to make up that figure? A. Yes, sir, I have.

Q. Exhibit 58, also, does it not, purport to cover the period December 31, 1941?

A. Yes, it is a summary of net worth December 31, 1941.

Q. Now, to that figure of $264,861.69 have you made certain additions and subtractions?

A. Yes, sir, I have.

Q. Now, will you look down to where on the extreme lefthand column you find the notation "Add deposit with Collector of I-n-t.," do you find the item?

A. Yes, that is Collector of Internal Revenue.

Q. Will you tell me what that item is?

(Testimony of Augustus V. Brady.)

A. Deposit with the Collector of Internal Revenue $50,000, and I believe Lister Allen testified to that on page 655 of [1958] the transcript.

Q. Have you added that sum to the net worth of Chin Lim Mow as of December 31, 1941?

A. Yes, sir, I have.

Q. Will you go to the next item and tell me what that is?

A. That is surrender value of life insurance $46,088.50.

Q. Have you added that item to your list of assets of Chin Lim Mow as of December 31, 1941?

A. Yes, sir, I have.

Q. What is your next item?

A. Real estate adjustments, items not included in above net worth of $264,861.69. That included property known as No. 23, located in Santa Cruz Chinatown. According to the testimony of Mr. H. Heiner, and I believe that is Exhibit 264, we have a cost of $14,113.40, less a loan outstanding as of December 31, 1941, of $3,428.01, leaving net equity of $10,685.39.

Property No. 22——

Q. Well, just a minute. Did you at my direction include the property at Santa Cruz under the heading "Defendant's assets as of December 31, 1941"?

A. Yes, sir, I did.

Q. Do you find that property listed in Exhibit 58, the Chin Lim Mow statement of December 31, 1941? A. No, sir, I do not.

Q. Have you, accordingly, added the value of

(Testimony of Augustus V. Brady.)

that property [1959] to the assets of the defendant as of December 31, 1941?

A. Yes, sir, I have.

Q. And can you tell me, is that the same property which was identified by the witness Mark Sena as having been purchased in his name?

A. I believe so.

Q. Now, will you go to the next item under the heading "Property 22"?

A. Property 22 is the west side of San Pablo and 55th Street, acquired 1940 (see Exhibit 63, which is the 1946 return), $6200. Loan on property, which was stipulated to, of $1,810.34. Depreciation at December 31, 1941, $67.50. Leaving a net equity in that property of $4,322.16.

Q. Is that property which was not listed on Exhibit 58, Chin Lim Mow summary of net worth as of December 31, 1941?

A. The cost is not shown on the schedule of real estate, equity in real estate, on Exhibit 58.

Q. Did you accordingly add that to the list of assets of the defendant, Chin Lim Mow, as at December 31, 1941? A. Yes, sir, I did.

Q. Will you give me the third item you have?

A. Property number 20, Clay and Grant Avenue, San Francisco, according to the testimony of William Wallace this property was transferred to Gerdon Land Company on June 30, 1942. Cost $53,750. There was a loan from the Anglo Bank, [1960] which was stipulated, of $27,852.73; and there was

(Testimony of Augustus V. Brady.)

another loan, W. S. Barton, $15,000, leaving a net equity of $10,897.27.

Q. Well, can you identify this property as that which has been testified to had been purchased in the name of, I believe, George Oliver?

A. I believe that is the property.

Q. You say transferred to Gerdon Land Company in 1942? From whom was it transferred?

A. Well, I think the records of the Gerdon Land Company, that chart entry will have to be referred to, Mr. Fleming.

Q. Do you recall that that was property which was testified to by the witness Hogan?

A. I have a reference here that Mr. Wallace testified in that regard.

Q. You don't recall Mr. Hogan's testimony on that subject?

A. He may have. I don't just recall right this minute. [1961]

Q. Did you at my direction include this property among the assets in the schedule, Chin Lim Mow, December 31, 1941? A. Yes, sir I did.

Q. And did you add that on to the total?

A. Yes, sir, I did.

Q. And is this property not shown in Exhibit 58?

A. No, it is not listed on Exhibit 58.

Q. Now, you have next an item which you call "Add adjustment to Gerdon Land Company, $86,-285.36." What is the source of that figure?

(Testimony of Augustus V. Brady.)

A. That was taken from the books of the Gerdon Land Company, Account 20.

Q. And have you substituted that figure for the second figure, equity in Gerdon real estate, $108,-099.93?

A. Yes. I might explain that, if I may, Mr. Fleming. On the net worth submitted by Mr. Chin Lim Mow in the Exhibit 58 he had equity in Gerdon Land real estate of $108,099.93, and in this computation we eliminate that $108,099.93 and substitute in place of that the balance shown on the Account 20 of the Gerdon Land Company as of December 31, 1941, of $86,285.36.

Q. Did you do that at my direction and request?

A. Yes, sir, I did.

Q. Did you also add an item $5,000, Yosemite Club property? A. Yes, sir, I did.

Q. And did you also add an item $6,000 adjustment in connection with Anglo Bank loan? [1962]

A. Yes, sir, I did.

Q. Now, I notice next an adjustment, minus adjustment in Gerdon Land Company, $22,000, June 30, 1942, which applies to December 31, 1941. Will you explain what that item represents?

A. According to your instructions there was an adjustment put on the books Gerdon Land Company June 30, 1942, which applies to December 31, 1941. So arriving at an adjusted net worth of December 31, 1941, we took that $22,000 into account.

Q. Does that in fact list the check for $22,000 from the Gerdon Land Company to the John J.

(Testimony of Augustus V. Brady.)

Allen, Jr., trustee account at December, 1941?

A. I would say yes.

Q. And was that check not charged against Account 20 until June, 1942?

A. That is the reason for this adjustment.

Q. And finally I will ask you about the item less life insurance loans, and ask you what is the source of that?

A. That amount was stipulated to.

Q. Does that represent—— A. A liability.

Q. A liability of Chin Lim Mow?

A. Yes, sir, it does.

Q. What is that, money he owes to the life insurance companies, or what?

A. Money he borrowed from life insurance. [1963]

Q. Now, have you then made the additions and subtractions which you have testified to and applied them to this figure in Exhibit 258 of $264,000 and some-odd dollars? A. Yes, sir, I have.

Q. And what figure do you arrive at?

A. $323,225.94.

Q. And what do you call that?

A. Adjusted net worth.

Q. As of what date?

A. December 31, 1941.

Q. I will write it up on the board. Chin Lim Mow net worth. Now, I will ask you if you have made a calculation of the net worth Chin Lim Mow as of December 31, 1944. A. Yes, sir, I have.

(Testimony of Augustus V. Brady.)

Q. And did you also make a calculation of net worth as of December 31, 1945?

A. Yes, sir, I have.

Q. And have you at my direction and at my request prepared certain charts setting forth that calculation under my supervision and direction?

A. Yes, sir, I have.

Q. And is Exhibit 339 for identification the calculations which you have prepared?

A. Yes, I have.

Mr. Fleming: I will offer the exhibit in evidence at [1964] this time, if the Court please.

Mr. Sullivan: Your Honor please, I will object to the introduction in evidence of the exhibit, basing my objection on as well as the grounds that I have heretofore indicated to your Honor in connection with Exhibit 337, if your Honor will accept the objection in that form without the necessity of my restating it. However, I understand that this—is that in order for me to do it that way, your Honor?

The Court: Yes.

Mr. Sullivan: However, on this exhibit, your Honor, I further elaborate upon the objection by stating that not only is this exhibit based upon assumptions of facts not in evidence, but it contains statements in the exhibit directly contrary to the evidence and I respectfully suggest to your Honor that in the interests of time and rather than have this exhibit go in with a vitiating factor in it, I would appreciate the opportunity of pointing those out to your Honor. I think it might have to be done

(Testimony of Augustus V. Brady.)

in the absence of the jury, but I have closely examined the record, and I find, I am convinced that on several of these items here not only has Mr. Brady put down items which are based upon assumptions of facts not in evidence, but items which are directly contrary to the evidence, and I don't know under what principle of law or upon what precedent, even in the cases which counsel mentioned, that that could be tolerated in a criminal case. [1965]

The Court: I am inclined to admit in in evidence. I will overrule your objection. You may develop it if you see fit on cross-examination.

The Clerk: Government's Exhibit 339 in evidence.

(Thereupon charts identified above were received in evidence and marked U. S. Exhibit No. 339.)

Mr. Fleming: I have copies of this exhibit for the jury.

Mr. Sullivan: And may I also enter the objection, your Honor, so it will be of record, to all of the testimony of the witness upon the same grounds that it is not the proper examination of the witness and the other grounds that I indicated which he may from time to time give in connection with this exhibit, even though he may not be reading from the exhibit, I notice that some of Mr. Fleming's questions called for answers of the witness which incorporated material from a source outside of the

(Testimony of Augustus V. Brady.)

exhibit, so I will not have to interrupt counsel, may I have that objection of record also?

The Court: The record will show your objection and its continuing character.

(Counsel for the Government passed copies of the Exhibit to the jury.)

Q. (By Mr. Fleming): Now, what is the title of this chart, Mr. Brady?

A. This is net worth as at December 31, 1944, and December 31, 1945. [1966]

Q. Now, have you set your figures for the two years in the column headed 1944 and the column headed 1945? A. Yes, sir, I have.

Q. And does this chart likewise purport to represent a tabulation prepared under my direction and at my request of the assets and the liabilities of Chin Lim Mow on the date indicated?

A. Yes, sir.

Q. What is the first item you have on the assets schedule?

A. Cash in bank and on hand. A separate schedule on that, a separate schedule for the detail of cash.

Q. Do you have that schedule with you?

A. Yes, sir, I do.

Q. May I have it, please? The schedule you referred to.

A. Yes. (Passing paper to counsel.)

Mr. Fleming: I will ask that this be marked

(Testimony of Augustus V. Brady.)

Government's Exhibit Next in order for identification.

The Court: It may be so received and marked.

The Clerk: Government's Exhibit 345 for identification.

(Thereupon document identified above was marked U. S. Exhibit No. 345 for identification.)

Q. (By Mr. Fleming): And is this document you gave me Exhibit 345 for identification the separate schedule which you just referred to?

A. Yes, a detail of cash. [1967]

Mr. Fleming: Offered in evidence, if the Court please, as Government's Exhibit 345.

Mr. Sullivan: Same objection, if your Honor please, that we have heretofore made to Exhibit 337, and by stating it in that manner, your Honor, without reiterating all the grounds?

The Court: Yes, it may be. The objection will be overruled, received in evidence.

The Clerk: Government's Exhibit 345 in evidence.

(Thereupon document previously marked U. S. Exhibit No. 345 for identification was received in evidence.)

Q. (By Mr. Fleming): Now, what are the figures you have for cash in bank and on hand at the end of 1944 and at the end of 1945?

A. The total, December 31, 1944, $127,947.31; December 31, 1945, $144,030.91.

(Testimony of Augustus V. Brady.)

Q. Now, will you explain, and directing your attention to the year 1944, the first eleven items which you have used to make up that figure of $127,000 and some odd dollars?

A. That represents the bank balances which have been stipulated to during the trial.

Q. Will you give us the names of the banks and the names in which those accounts were carried? Could you do that by referring to Exhibit 345?

A. American Trust Company, Emeryville Branch, Chin Sue Ngor and Wong Ying. Balance—— [1968]

Q. Don't give us the balances, just the names and the account.

A. The American Trust Company, Broadway Branch, Oakland, Wong Ying and Bertha Chan. Bank of America, Oakland Main Office, Wong Ying and Bertha Chan. Bank of Canton, B. H. Chan and Wong Wing. Bank of America, Oriental Branch, Commercial Account, B. H. Chan.

Bank of Canton, San Francisco, commercial account, B. H. Chan, and Ying Wong Chan. American Trust Company, Broadway office, Oakland, John J. Allen, Jr., trustee account. Bank of Canton, commercial account, Admay Company. American Trust Company, Emeryville Branch, Wong Ying Chan, marked Chin in parentheses.

Farmers and Merchants Savings Bank in Oakland, Wong Ying, May Sue Chan, Janet Chan. Farmers and Merchants Savings Bank, Oakland, Wong Toy, Wong Ying, Raffaelli. I guess that's all.

(Testimony of Augustus V. Brady.)

Q. Have you then taken the balances as shown by the stipulation in those accounts as of the end of 1944 and the end of 1945 and added them up and included them as part of this first figure?

A. Yes, sir, I have.

Q. Now, directing your attention to the year 1944, what other figure did you include?

A. We also included the Bank of Canton 20 savings accounts opened in 1944 from Exhibits 125 to 144, and added the accumulated interest December 31, 1944, interest making a total [1969] of $100,650.

Q. Were those the savings accounts $5,000 each and in 20 different names? A. Yes, sir.

Q. And have you to those two items added a third item called cash on hand?

A. Yes, I have.

Q. And how much was that?

A. $14,346.85, cash on hand used to purchase Property 34, January 4, 1945, according to the testimony of Mr. Corbett on page 290.

Q. Was that the testimony that $14,346.85 in currency had been used on January 4, 1945?

A. I believe that is correct.

Q. Deposits on certain real property?

A. I believe that's correct.

Q. Now, did you then add up those three figures and secure the total of $127,947.31, the first figure on your chart for the year 1944?

A. Yes, sir.

Q. Now, your figure of 1945, will you indicate

(Testimony of Augustus V. Brady.)

the first eleven items going to make up that figure?

A. Well, American Trust Company——

Q. Don't read them. I will ask you if those are the same bank accounts you just read? [1970]

A. Yes, sir.

Q. Did you take the balances as indicated in the stipulation? A. Yes, sir.

Q. Now, then what is the next item which you have included?

A. Pacific National Bank, San Francisco, commercial account, Howard and Evelyn Lee Chang, trustee, going to the testimony of Mr. Clark, $17,500.

Q. Did you take the balance shown in that bank account as of December 31, 1945? A. Yes.

Q. The next item?

A. Bank of Canton, the bank accounts we refer to in 1944 were still open at the end of 1945.

Q. Referring here to the 20 savings accounts as we have previously identified them? A. Yes.

Q. And the final item?

A. The final item shows a cash on hand, a deposit January 3, 1946, in the Pacific National Bank, Exhibit 234, of $70,000, making a total of $144,030.91.

Q. Was that the deposit identified by the witness Evelyn Lee Chang? A. Yes.

Q. What was the date of that deposit?

A. January 3, 1946. [1971]

Q. Have you in your chart included—was that the deposit in currency?

A. The best of my recollection.

Q. Don't recall the exhibit——

(Testimony of Augustus V. Brady.)

A. Testified to that, yes.

Q. Have you included that $70,000 in currency as cash on hand as of December 31, 1945?

A. Yes, I have.

Q. Now, the total of those figures then is how much?

A. 1944, $127,947.31; 1945, $144,030.91.

Q. Now, I will direct your attention to the next item, Account 20, Gerdon Land Company, Exhibit 56, and ask you what are the figures you have there for 1944 and for 1945?

A. December 31, 1944, we have $248,143.43; 1945, $319,105.51.

Q. Now, I will show you the books, Account 20, and I will direct your attention to an entry December 31, 1946, in Account 20, and ask you if you will read that item?

A. December 31, 1946, account 8th and Webster Street per the journal, $12,535.68.

Q. You find the journal for December 31, 1946, referring to that same item? A. Yes, sir, I do.

Q. And will you read me the descriptive matter?

A. Real estate number 18, 8th and Webster Street, $12,535.68 is debited and accounts payable is credited with the same [1972] amount, and the explanation, "To agree with the Revenue Agent's valuation."

Q. What property does that relate to, can you tell me by referring to that exhibit?

A. Exhibit — Property 18, 8th and Webster Streets.

(Testimony of Augustus V. Brady.)

Q. Yes. Now, have you then at my direction and at my request taken a figure which you have just read and added it on to the balance shown in Account 20 as of the end of 1944 and the end of 1945?

A. I see here, Mr. Fleming, I have added $12,-536.68. That $1 at this moment I can't explain it, probably was an error on my part in putting a 6 instead of a 5; $1 difference there.

Mr. Fleming: Will you read the question?

(Question read by the Reporter.)

Q. (By Mr. Fleming): Did you add those on in the Account 20 balance?

A. Yes, but I inadvertently made a mistake of $1. I added it as $12,536.68.

Q. With the exception of that $1 did you add that figure on to the Account 20 balance?

A. Yes, sir, I did.

Q. And with the result of—did it then result in the figures which you have included in this chart under Account 20? A. Yes, sir, I have.

Q. Now, I will direct your attention to the next item on [1973] your chart and ask you can you tell me what that item is?

A. Miscellaneous deposits.

Q. And showing you Exhibit 338 for identification I will ask you if this is a breakdown of miscellaneous deposits prepared at my request and under my direction of figures which have gone into the net worth statement? A. Yes, sir, it is.

(Testimony of Augustus V. Brady.)

Mr. Fleming: Offer in evidence, if the Court please, as Government's Exhibit 338.

Mr. Sullivan: Same objection, if your Honor please; may we state it without reiterating all the grounds, the same way? The same objection we made to Exhibit 337 we make to this exhibit.

The Court: Same ruling. The objection will be overruled, it will be received in evidence.

The Clerk: 338 in evidence.

(Thereupon document identified above was received in evidence and marked U. S. Exhibit No. 338.)

Mr. Sullivan: May we have the same objection continuing your Honor please, with respect to the witness' testimony?

The Court: The record will reflect that.

Q. (By Mr. Fleming): Now, you have included miscellaneous deposits under 1944 of $26,000. Will you give me the breakdown on that, please?

A. Yes. Detail of miscellaneous deposits. That's 11-6-44, [1974] a deposit on property 29, Hobart, and Telegraph, testimony of Mr. Ogilvie, page 699, $2500.

11/14/44, deposit on property 29, Hobart and Telegraph, Mr. Ogilvie, $12,500.

Q. Now, in that connection, are you referring to the two checks of Mr. Ogilvie he testified he delivered, I believe in November and December, 1944, to the Hibernia Bank for the purchase of that property? A. That is the testimony.

Q. Very well.

(Testimony of Augustus V. Brady.)

A. December 14, 1944, deposit on property 30, 23rd and Broadway, Mr. Ogilvie, page 703, $5,000.

Deposited on Property No. 34 of 1555 Oak Street, I believe Mr. Corbett on page 290, $500.

11-13-45——

Q. Pardon me. Just give me the 1944.

A. All right. Deposit 18th and 20 Waverly Place, Mr. Hogan on page 592, $500.

Q. Was that the deposit Mr. Hogan entered in his books under the name of Evelyn Lee Chang?

A. Yes, sir, deposit on Mandarin Theater. Mr. Hogan testified to that on page 579, 580 and 585, $5,000, making a total of $26,000.

Q. Now, you have given a total for all deposits at the end of 1945 of $22,000. Will you indicate the breakdown of that item? [1975]

A. Yes. November 13, 1945, deposit on property, 5,000 Broadway, also known as the Quarry, Mr. Ogilvie at page 710, of $12,500. Deposit on liquor purchase—I believe that is what you read, Mr. Deasy's, $4500.

Q. Pardon me, on the previous transaction, $12,500—— A. Yes.

Q. ——is that what you are referring to now, to the Evelyn Lee Chang purchase of the cashier's check for $12,500 and its subsequent deposit to the Pacific States Bank? A. Yes.

Q. Now, will you give me the net item, please?

A. Deposit on liquor purchase, I believe that is what you read from Mr. Deasy's testimony in the first trial, $4,500.

(Testimony of Augustus V. Brady.)

Deposit on Mandarin Theater, Mr. Hogan, $5,000 making a total of $22,000.

Q. Now, on that last item you have referred to the testimony of Mr. Hogan that he was given $9,000 in currency by Chin Lim Mow and at the end of the year he still had $5,000 of that currency in his safe deposit box?

A. I believe that is the testimony, yes, sir.

Q. Now, what is the next item you have on your chart? A. Next is government bonds.

Q. And the amounts?

A. December 31, 1944, $56.25; December 31, 1945, $6,056.25.

Q. And what was the source of that information? [1976]

A. I believe Mr. Filice testified and you submitted an exhibit, No. 274, giving the detail of the bonds which were held in the name of the defendant and his wife which information, I believe, was secured from the Bureau of Public Debt.

Q. Now, will you go to the next item, please, and tell me what that item represents?

A. May I have a ruler please? It is easier to follow these down.

The next item I have is claim against the Wilbur Pierce—I believe Mr. Farley testified on that, and I believe you have Exhibit 257, balance December 31, 1944, $17,509.47; balance December 31, 1945, $20,935.07.

Q. Now, showing you Exhibit 280 for identification I will ask you if that is a tabulation of the

(Testimony of Augustus V. Brady.)

breakdown of those items prepared at my direction and request? A. Yes, sir.

Mr. Fleming: Offered in evidence, if the Court please, as Government's Exhibit——

Mr. Sullivan: Same objection, your Honor please, that we have heretofore made with respect to Exhibits 337, 338 and 342. May we state it that way, your Honor, without reiterating the grounds?

The Court: Very well. The objection will be overruled.

Mr. Sullivan: My objection also goes to the testimony of the witness in this connection. [1977]

The Court: The record will reflect that.

The Clerk: Government's Exhibit 280 in evidence.

(Thereupon document referred to above was received in evidence and marked Government's Exhibit No. 280.)

Q. (By Mr. Fleming): Now, the next item, please, Mr. Brady?

A. American Distilling Company stock. I believe Mr. Wiley testified to that, and also shown in Exhibit 10, which is the 1947 return? Or '46 return?

Q. I believe it is the '47 return.

A. '47 return showing the cost of $61,000.

Q. Is that Chin Lim Mow's return, you recall?

A. Yes, sir.

Q. What figure there have you included?

A. $61,000 for 1944 and 1945.

Q. Will you go to the next item please?

(Testimony of Augustus V. Brady.)

A. The Wai Yuen Club.

Q. And what figures did you include there?

A. $22,081.55, December 31, 1944, and $37,658.19 balance December 31, 1945.

Q. I will show you Exhibit 281 and ask you if that is a chart you prepared at my direction and request and under my supervision indicating investment in the Wai Yuen Club? A. Yes, sir.

Mr. Fleming: Offer in evidence, if the Court please, as Government's Exhibit 281. [1978]

Mr. Sullivan: Same objection, if your Honor please, heretofore entered to Exhibits 337, 388 and 342.

The Court: Same ruling; objection will be overruled.

Mr. Sullivan: Same objection with reference to the testimony.

The Court: Same ruling.

The Clerk: 281 in evidence.

(Thereupon the document identified above was received in evidence and marked U. S. Exhibit No. 281.)

Q. (By Mr. Fleming): Now, did you on Exhibit 281 take the case as shown in the Bank of America Chinatown branch and the outstanding checks and the redeposited so-called bonus checks and make a tabulation which you have labeled "Adjusted bank balance"? A. Yes, sir, I have.

Q. Now, what figure do you have for 1944 and for 1945?

(Testimony of Augustus V. Brady.)

A. 1945 I have an overdraft—1944 I have an overdraft of $742.46, as the adjusted balance December 31, 1945, $1,133.90.

Q. Did you, in taking the cash on hand as of December 31, 1944, make an error in your figures?

A. Yes, I believe the Exhibit 185 shows a transcript of the bank account, was shown as $5,789.96 instead of $5,989.96. However, I did not make this adjustment, because the schedules [1979] had been photostated and the error would have been—the adjustment would have been in favor of the—by making the adjustment it would be against the Government, so leaving it this way it was favorable to the defense.

Q. Now—— A. Instead of $200.

Q. What are the other items you have included at my direction, and investment of the Wai Yuen Club? What were the titles of those?

A. Deposit on lease, furniture and fixtures, less reserve for depreciation. Building less reserve for depreciation. [1980]

Q. From what source did you obtain those figures? A. Exhibit 186.

Q. What is that? Well, is that Exhibit 186 a balance sheet identified by the witness David Shew?

A. Yes.

Q. By adding those amounts, did you arrive at the totals shown in your chart for the year end—end of the year 1944 and end of the year 1945?

A. Yes, I did.

(Testimony of Augustus V. Brady.)

Q. What is the next item you have included in the schedule of assets?

A. Tai Sun Cobpany, and I have a reference to Exhibit 58, which was the sworn statement of Mr. Chin Lim Mow.

Q. What figure do you give there?

A. $1,000 at the beginning and end of the period.

Q. Are those the figures you found in the defendant's sworn statement, Exhibit 58?

A. Tai Sun Company? I have it marked Exhibit 58 here, Mr. Fleming, but I believe Mr. Wiley testified on that. That reference I have here could be an error of $1,000, but——

Q. You refer, then, to Mr. Wiley's testimony?

A. Yes.

Q. What is the next item which you have included?

A. Western Supply Company, and Mr. Wiley testified to that, investment of $500 beginning and end of the period. [1981]

Q. And the next item?

A. United Trading Company, and Evelyn Lee Chang testified. I think it is Exhibit 242. We used a balance, December 31, 1944, and 1945 of $10,000.

Q. Your next item?

A. United Food Supply Company. Evelyn Lee Chang, Exhibit 242, $23,937.71, December 31st, 1944. $23,937.71, 1945.

Q. Your next item?

A. Wai Lee Company. There is a separate schedule on that.

(Testimony of Augustus V. Brady.)

Q. Showing you Exhibit 282, document headed "Investment in Wai Lee Company, liquor store," I will ask you if that is a separate schedule that you prepared at my direction and request?

A. Yes, sir.

Mr. Fleming: Offered in evidence, if the Court please, as Government's Exhibit 282.

Mr. Sullivan: Same objection, if your Honor please, we have heretofore entered with respect to Exhibit 337. May we state it that way?

The Court: You may, and the objection will be overruled. It will be admitted into evidence.

The Clerk: Government's Exhibit 282 in evidence.

(Thereupon document referred to was received in evidence and marked U. S. Exhibit No. 282.)

The Court: I think we will take the recess at this time, [1982] since we started at 9:30 this morning. Take a recess for a few minutes, ladies and gentlemen.

(Short recess.)

Q. (By Mr. Fleming): Mr. Brady, I believe the last figure which you mentioned was the Wai Lee Company; and I will ask you what items you used to make up the figures which you have given for the years 1944 and 1945?

A. December 31, 1944, $5,641.56. December 31, 1945, $12,834.11.

(Testimony of Augustus V. Brady.)

Q. What items did you include to make up those figures? I will show you Exhibit 282.

A. We used the cash on hand and in bank, Exhibit 212, December 31st, 1944, of $1,220.96; December 31st, 1945, $7,107.94; inventory, Exhibit 212, December 31, 1944, $4,449.72; December 31, 1945, $5,762.41.

My total as to December 31st, 1944, is $5,567.68. Total assets, December 31st, 1945, $12,870.35, minus sales tax, Exhibit 212, $29.12, December 31, 1944; $36.24, December 31, 1945; leaving a net worth December 31, 1944, of $5,641.56; December 31st, 1945, $12,834.11.

Q. Now, I will direct your attention to the next five items, and ask you if you will give me the source of the figures that you included there for the Mandarin Hotel, Sherman Hotel, Alpine Hotel, Bayshore Auto Court and San Fran Hotel? [1983]

A. Exhibit No.——

Q. I don't want the exhibit. Just tell me what the source is? Well, let me ask you this: Can you identify those as balance sheets prepared by the witness Farley? A. Yes, sir.

Q. Will you turn to the next item, Elite Company, and tell me the figure which you have used there for the end of 1944 and end of 1945?

A. Balance December 31st, 1944, $53,630 even. Balance December 31, 1945, $43,800.

Q. Have you taken those figures from an exhibit heretofore prepared and introduced in evidence by the witness Farley? A. Yes.

(Testimony of Augustus V. Brady.)

Q. I direct your attention to the next item, Pierce Building, and will you give me the figure that you used for that item?

A. Pierce Building balance, December 31, 1944, $45,622.41.

Q. Where did you get that figure?

A. I believe that is Exhibit 316, and also Mr. Wallace's testimony.

Q. Well, by Exhibit 316, are you referring to the Pierce Company books, introduced in evidence?

A. Yes, sir, I believe that is it.

Q. What is the figure you have used for the end of 1945? A. $45,283.43.

Q. Will you tell me how you made that calculation? [1984]

A. Yes, sir. I believe we used the balance per books, and there was an adjustment of $3,591, that was marked "Accounts receivable," that we offset this advance to reduce this figure to $45,283.43.

Q. Well, did you in effect take the net worth as shown by the books, and from it subtract the amounts the books indicated on this account owed to the Pierce Building? A. Yes, sir.

Q. How about the next item? Give me the figure you have for that.

A. Real estate holdings?

Q. Yes.

A. Separate schedule, Exhibit 264. Balance December 31st, 1944, $278,475.43. Balance December 31st, 1945, $565,228.94.

(Testimony of Augustus V. Brady.)

Q. And did you in that refer to schedule identified by the witness Farley, tabulation of profits?

A. Yes, sir; I did.

Q. The next item?

A. Western Department Stores stock. Balance December 31st, 1944, $3,420.97.

Q. Where did you get that item?

A. That cost was shown on the Exhibit 1 of the 1945 return. That stock was sold.

Q. By Exhibit 1, you refer to Chin Lim Mow's tax return for 1945? [1985] A. Yes, sir.

Q. Will you give me the next item, please?

A. Bock Hing Trading Corporation, balance December 31, 1945, $3,848.45.

Q. Did you derive that from Exhibit 223, being a balance sheet filed with the Corporation Commissions, dated, I believe, October, 1945?

A. Yes, sir.

Q. Now, the next items: Watsonville, Bakersfield, Alviso, Yosemite Club, Hollywood Club, 3600 San Pablo, Emeryville, the Palms, and an item, "Bank Roll," cash for above clubs; what figure have you included for that item? A. $50,000.

Q. And what does that represent?

A. Well, that would be the moneys used to operate the clubs, known as the Bank Roll.

Q. Are you referring to gambling, now?

A. Yes, sir.

Q. Now, I see you have a reference here, "Overstreet." To what do you refer in that? What did you refer to at that time?

(Testimony of Augustus V. Brady.)

A. Mr. Overstreet was the police officer that testified that he picked up some $43,000 in the raid and there was several thousand dollars that they did not pick up, so——

Q. (Interposing): Have you then at my direction included [1986] the figure of $50,000 as bank roll for all the defendant's gambling clubs?

A. Yes, sir; I have.

Q. And have you taken a constant figure at the beginning and end of the year, 1945?

A. Yes, sir; I have.

Q. Now, I will direct your attention to the next item and ask you to give me the figure you have used for that item?

A. The Lions Den? Balance December 31, 1944, $25,000. Balance December 31, 1945, $25,000.

Q. And from what source did you derive those figures?

A. The 1947 return, I believe Exhibit 283, shows a cost of that property when it was disposed of, $25,000 for his interest.

Q. Give me the next item, please.

A. Cash surrender value of life insurance, balance December 31, 1944, $26,771.54; balance December 31, 1945, $31,664.43.

Q. And the next item under assets?

A. One-eighth interest in Mandarin Theater. Balance December 31, 1944, $10,500; balance December 31, 1945, $10,500.

Q. Now, did you total up the total assets?

A. Yes, sir.

(Testimony of Augustus V. Brady.)

Q. What is that figure? [1987]

A. Balance December 31, 1944, $1,050,255.02; balance December 31st, 1945, $1,449,727.82.

Q. Now, I direct your attention to figures under "liabilities" and ask you to give me the first item there.

A. Real estate loans, balance December 31, 1944, $112,449.76; balance December 31st, 1945, $265,-066.71.

Q. And the next item?

A. Loans on life insurance, balance December 31, 1944, $18,703.40; balance December 31, 1945, $20,021.68.

Q. And the next item?

A. Reserve for depreciation. Balance December 31, 1944, $32,628.49; balance December 31, 1945, $44,484.39.

Q. And the last item?

A. Hogan & Vest loan. I believe Mr. Hogan testified, page 587, there was $5,000 outstanding at December 31, 1945.

Q. Now, what are the figures you have for total liabilities?

A. Total liabilities, December 31st, 1944, $163,-781.65; balance December 31st, 1945, $334,572.78.

Q. Finally, what are the figures you have for net worth for the year 1944, end of 1944?

A. Net worth December 31st, 1944, $886,473.37.

Q. December 31st, 1944, $886,473.37?

A. Yes.

(Testimony of Augustus V. Brady.)

Q. And what was the figure you had for the end of 1945? A. $1,115,155.04. [1988]

Q. Now, have you at my direction and request made a computation of "Understatement of income based on increase in net worth" for the period 1942 to 1944, inclusive? A. Yes, sir; I have.

Q. And showing you Exhibit 340, for identification, I will ask you if that is the computation you made? A. Yes, sir; it is.

Mr. Fleming: Offer it in evidence, if your Honor please, as Government's Exhibit 340.

Mr. Sullivan: Same objection, if your Honor please, we have heretofore entered to Exhibit 337. May we have it that way, without reiterating the grounds?

The Court: The record will reflect your objection, and it will be overruled and the exhibit will be received in evidence.

The Clerk: Government's Exhibit 340 in evidence.

(Thereupon computation referred to was marked U. S. Exhibit No. 340 in evidence.)

Mr. Fleming: I have copies of it for the members of the jury and the Court. Is there any member of the jury who doesn't have a copy?

Q. (By Mr. Fleming): Directing your attention to Exhibit 340, I will ask you, first, what is all of the title you have got?

A. "Understatement of income based on increase in net worth plus non-deductible expenditures and

(Testimony of Augustus V. Brady.)

minus [1989] non-taxable income, 1942 to 1944, inclusive."

Q. Is this a calculation of income based on the net worth method as you described yesterday?

A. Yes, sir.

Q. What are the first two items?

A. The first two items, net worth at December 31st, 1941. Do you want the amount?

Q. No.

A. The net worth at December 31st, 1944.

Q. Are they the same two items which I have written on the board, which we went through in those two previous charts? A. Yes, sir.

Q. What did you do with those items?

A. Well, I took the difference between the period 1941 and 1944, and I arrived at an increase in net worth of $563,247.43.

Q. Now then, will you tell us the next item you have, which starts with "Add"?

A. Add Federal income taxes and penalties paid in 1942 to 1944, inclusive.

Q. What is the total for that?

A. Total income, taxes paid by Mr. Chin and his wife, including penalties, $177,922.81.

Q. Now, why did you add that? [1990]

A. Because that is a non-deductible item for income tax purposes.

Q. Does that represent moneys spent by him during the period 1942 to 1944?

A. That is correct.

Q. What is the next item?

(Testimony of Augustus V. Brady.)

A. Life insurance premiums paid 1942 to 1944, inclusive. That also is an expenditure which is not deductible for tax purposes.

Q. Does that represent moneys spent by Chin Lim Mow during the period 1942 to 1944?

A. Yes, sir.

Q. Did you add that? A. Yes, I did.

Q. What is the next item?

A. Fines paid the United States Government in 1943 per Exhibit 255, $10,023.75.

Q. Does that, too, represent moneys spent by Chin Lim Mow during the period 1942 to 1944, inclusive? A. Yes, it does.

Q. And did you add that? A. Yes, I did.

Q. What is the next item?

A. Personal living expenses.

Q. What did you include for that? [1991]

A. That, we included nothing.

Q. Now, if you should be able to determine the amount he has spent for living expenses, would it have been proper under the net worth theory to add the entire living expenses to this calculation?

A. Yes, sir.

Q. Now, what is the total which you have put down of those items which you have just given us?

A. $769,149.59.

Q. Now then, I notice you have two items here under the heading "Less." Will you give us those items and those amounts, please?

A. Yes. Non-taxable portion of capital gains as reflected on 1944 return, Exhibit 7, of $3,416.54.

(Testimony of Augustus V. Brady.)

Q. And from whose return did you secure that figure? A. The defendant's.

Q. Chin Lim Mow's return? A. Yes.

Q. Next?

A. Increase in cash surrender value of life insurance, $13,823.03.

Q. And have you then subtracted those items from the figure which you have previously given us?

A. Yes, I have.

Q. With what result? [1992]

A. Arrived at taxable net income on the net worth basis of $751,910.02.

Q. Now, this covers the period of what years, please? A. 1942 to 1944, inclusive.

Q. In those three years, under the calculations you have made, what did you determine was the total income of Chin Lim Mow during that period?

A. $751,910.02.

Q. Did you examine the tax returns of the defendant, Chin Lim Mow and Chin Wong Shee, to determine how much income he had reported on his tax returns during that three-year period?

A. Yes, sir.

Q. And what is the figure?

A. A hundred ninety-two thousand——

Q. This is the figure of income reported on tax returns?

A. Tax returns of husband and wife.

Q. How much? A. $192,407.25.

Q. Did you then by subtracting the amount of income actually reported from the total income ar-

(Testimony of Augustus V. Brady.)

rive at a figure of unreported income for this three-year period? A. Yes, I did.

Q. And how much was that?

A. $559,502.77. [1993]

Q. $559,502.77? A. That's right.

Q. Did you make a similar calculation, understatement of income, for the year 1945?

A. Yes, sir; I did.

Q. And I will show you Exhibit 342, for identification, and ask you if that is the calculation you made for the year 1945? A. Yes, it is.

Mr. Fleming: Offer it in evidence, your Honor, please, as Government's Exhibit 342.

Mr. Sullivan: Make the same objection, if your Honor please, with respect to this exhibit as we did with respect to Exhibit 337, and ask the Court's permission that we may do so in that form without reiterating all the grounds.

The Court: You may do so, and the objection will be overruled. It will be received in evidence.

The Clerk: Government's Exhibit 342 in evidence.

(Thereupon calculation referred to was received in evidence and marked U. S. Exhibit No. 342.)

Mr. Fleming: I have similar photostatic copies of this for the use of the Court and jury (handing documents to Court and jury).

Q. (By Mr. Fleming): Now, will you tell me with respect to this document if you went through

(Testimony of Augustus V. Brady.)

the same process which [1994] you have described for the years 1942 to 1944, inclusive, that is, calculation of taxable income on the net worth basis?

A. Yes, sir; I did.

Q. What are the two starting figures which you use?

A. Net worth as of December 31, 1944; net worth as of December 31st, 1945.

Q. And will you give us those figures again, please?

A. December 31, 1944, $886,473.37.

Q. And the figure for the end of 1945?

A. $1,115,155.04.

Q. And did you then find an increase or decrease in net worth during the year 1945?

A. Increase.

Q. How much? A. $228,681.67.

Q. Now, will you give us the next item you have put down on the chart?

A. Plus non-deductible expenses. Federal income taxes paid in 1945 by Chin Lim Mow per Exhibit 31, $20,275.19; Chin Wong Shee, Exhibit 32, $20,275.19; making a total of $40,550.38.

Q. Does that represent moneys spent during the year 1945 by Chin Lim Mow and Chin Wong Shee?

A. Yes. [1995]

Q. And did you, accordingly, add or subtract that? A. I added it.

Q. What is the next item?

A. Fines and forfeitures, $13,301.75.

(Testimony of Augustus V. Brady.)

Q. I will show you Exhibit 341, for identification, and ask you if that is a separate schedule you prepared of fines and forfeitures during the year 1945, referring to Chin Lim Mow? A. Yes.

Mr. Fleming: Offer it in evidence, if the Court please, as Government's Exhibit 341.

Mr. Sullivan: Same objection, if your Honor please, as we made to Exhibit 337, we make to this exhibit, and ask leave of the Court to submit it in that form without reiterating the grounds.

The Court: Very well. Objection will be overruled and it will be received in evidence.

The Clerk: Government's Exhibit 341 received in evidence.

(Thereupon schedule referred to was received in evidence and marked U. S. Exhibit No. 341.)

Q. (By Mr. Fleming): Now, will you give me the breakdown of the items you have included in fines and forfeitures paid, 1945?

A. Yes. Details of fines and forfeitures. Marion Overstreet, [1996] page 88, dated 2/14/45, in the amount of $2,300.

Sheriff Long, a forfeiture, page 96, dated August 28, 1945, $6,251.75.

Mrs. Lou Zellers, Contra Costa County, page 109, dated 9/12/45, $2,750.

Mr. George Gibbons, on page 122 of the transcript, mentions in 1945 he took some money to bail some people out, $2,000.

That makes a total of $13,301.75.

(Testimony of Augustus V. Brady.)

Q. I notice after "George Gibbons," you have "$2,000" and the figure "plus." A. Yes.

Q. Will you identify that reference, please?

A. He said it was about $2,000, my recollection, could have been more, so you instructed me to put $2,000 down.

Q. Now, these fines and forfeitures, do they represent money paid out, moneys spent by the defendant during the year 1945? A. Yes.

Q. Did you then add or subtract this amount of $13,301.75?

A. I added it to the increase in net worth.

Q. How about the next item?

A. Life insurance premiums paid, $4,930.60.

Q. Does that represent moneys spent by the defendant? A. Yes, sir. [1997]

Q. And the next item?

A. Personal living expenses.

Q. What sum have you put down on that item?

A. We put nothing down.

Q. Well, on the net worth basis if you were able to identify personal living expenses, would that be added to the total income?

A. It would be added to the increase in net worth, yes.

Q. Now, what is the total which you arrived at?

A. $287,464.40.

Q. And have you taken some subtractions?

A. Yes, sir.

Q. Will you give us those, please?

(Testimony of Augustus V. Brady.)

A. Non-taxable income was a refund of Federal F.I.C. taxes per Exhibit 41, $10,500.45. Increase in cash surrender value of life insurance, $4,892.39. Non-taxable portion of capital gains per Exhibit 1, the return, $1,157.17. Making a total reduction of $16,550.01.

Q. And have you then made those additions and subtractions and arrived at the figure of taxable net income on the net worth basis for the year 1945?

A. Yes, sir; I have.

Q. And will you give me that figure, please?

A. $270,914.39.

Q. Now then, 1945, you have given us a net income figure [1998] of how much?

A. $270,914.39.

Q. Did you examine the defendant's tax returns in the name Chin Lim Mow and Chin Wong Shee for the year 1945 to determine how much was reported on the tax return of the defendant and his wife for that year? A. Yes.

Q. And how much did you find was reported?

A. Reported by both husband and wife was $54,341.66. [1999]

Q. Did you then make a calculation of unreported income for the year 1945?

A. Yes, I did.

Q. And what is the total? A. $216,572.73.

Q. In connection with this calculation I will show you Government's Exhibit 286 for identification and ask you if this is a calculation you made, headed "Detail of sales of capital assets"?

(Testimony of Augustus V. Brady.)

A. Yes.

Mr. Fleming: Offered in evidence, if the Court please, as Government's Exhibit 286.

Mr. Sullivan: We make the same objection, if your Honor please, we made heretofore with respect to the other exhibits, particularly 337, and ask leave of Court to state it in that way without reiterating the grounds.

The Court: Very well, the record will show that, and the objection will be overruled.

The Clerk: 286 in evidence.

(Thereupon the document identified above was received in evidence and marked U. S. Exhibit No. 286.)

Q. (By Mr. Fleming): Now, I will show you Government's Exhibit 343 for identification and ask you if you can identify that document, please?

A. It is a schedule of Federal income taxes reported on the [2000] returns of Chin Lim Mow's family for the year 1945.

Q. Did you secure those figures from the exhibits mentioned? A. Yes, sir.

Mr. Fleming: Offered in evidence, if the Court please, as Government's Exhibit——

The Court: Be received.

Mr. Fleming: ——343.

The Clerk: Government's Exhibit 343 in evidence.

(Testimony of Augustus V. Brady.)

(Thereupon the document identified above was received in evidence and marked U. S. Exhibit No. 343.)

Mr. Fleming: I will ask that this document be marked Government's exhibit next in order, a document headed Chin Lim Mow taxes paid 1945 by other members of the family.

The Clerk: Government's Exhibit 346 for identification.

Q. (By Mr. Fleming): I will show you Exhibit 346 for identification and ask if you identify this as a tabulation of the taxes paid in 1945 by other members of the Chin family per Exhibits 33 to 40, inclusive? A. Yes, sir.

Mr. Fleming: Offered in evidence as Government's Exhibit 346.

The Court: Let it be received.

The Clerk: Government's 346 in evidence.

(Thereupon the document identified above was received in evidence and marked U. S. Exhibit No. 346.) [2001]

Q. (By Mr. Fleming): Now, I will show you Exhibit 344 and ask if you have made a calculation of tax of Chin Lim Mow and spouse Chin Wong Shee for the taxable year ending December 31, 1945? A. Yes, sir; I have.

Q. And is that the calculation?

A. Yes, it is.

(Testimony of Augustus V. Brady.)

Mr. Fleming: Offer in evidence, if the Court please, as Government's Exhibit 344.

Mr. Sullivan: Objected to, if your Honor please, upon the same grounds we have heretofore stated with respect to 337. I ask leave of the Court to state the objection in that way.

The Court: You may do so. The objection will be overruled, received in evidence.

The Clerk: Government's Exhibit 344 in evidence.

(Thereupon the document identified above was received in evidence and marked U. S. Exhibit No. 344.)

Q. (By Mr. Fleming): Now, so far you have given us calculations of income, have you not?

A. That's correct.

Q. And when you gave us this figure, these figures of $270,914.39, that is the figure of taxable income, is it not? A. That's correct.

Q. And when you gave the figure for the year 1942, 1943, and 1944 of $751,910.02, that, too, is a figure of income? [2002] A. That's correct.

Q. Is it not? A. That's correct.

Q. Now, with respect to tax for the year 1945 I will ask you what is the starting figure you used in this calculation?

A. For the taxable year ending December 31, 1945, income per Exhibit 342 shows $270,914.39.

Q. And to that figure have you made the addition indicated on the chart? A. Yes.

(Testimony of Augustus V. Brady.)

Q. And how much is that addition?

A. I added $27,239.09.

Q. And is that the figure indicated in Exhibit 346, Chin Lim Mow Federal income taxes paid in 1945 by certificates 33 to 40, inclusive?

A. Yes, sir.

Q. And what figure then did you reach as the total? A. $298,153.48.

Q. Now, on that figure of $298,000 and some odd dollars did you make a computation of tax?

A. Yes, sir.

Q. And did you make that computation for husband and wife, Chin Lim Mow and Chin Wong Shee? A. Yes, sir.

Q. And what was the total tax which you calculated? [2003]

A. The total tax for husband and wife was $228,645.18.

Q. And did you examine Exhibits 1 and 2 to see the taxes reported by Chin Lim Mow and Chin Wong Shee? A. Yes.

Q. And did you put down those figures?

A. Yes.

Q. And what was the total? Do you have them listed separately on this particular exhibit?

A. Yes, I do.

Q. Will you give us the addition?

A. Tax reported on Exhibit 1, Chin Lim Mow, $11,646.03. Tax reported on Exhibit 2, Chin Wong Shee, $11,646.03.

(Testimony of Augustus V. Brady.)

Q. Did you also put down the taxes reported on the returns of Chin Lim Mow's family for the year 1945 as set forth in Exhibit 343, being the tax reported in the name of Bertha Chan, Alvin Chan, Norma Wong Chan, Janet Chan Lee, May Chan, Wu Taam, Hom Yuk Lim and Norman Chan?

A. Yes, I did.

Q. What is the total of all those taxes reported on those returns for the year 1945?

A. $23,583.77.

Q. Did you then add up the total tax reported, Chin Lim Mow, Chin Wong Shee and the Chin family on that schedule? A. Yes, sir.

Q. And what was the total? [2004]

A. $46,875.83.

Q. And did you calculate the difference between the tax as you have computed it and the tax reported which you have just identified?

A. Yes, sir.

Q. And what is that figure?

A. $181,769.35.

Q. Can you identify those same figures as having been set forth in the graphic chart which I will ask at this time be marked as Government's exhibit next in order?

The Clerk: Government's Exhibit 347, for identification.

Q. (By Mr. Fleming): I will show you the chart as soon as counsel has examined it and I have had it marked.

(Testimony of Augustus V. Brady.)

Can you identify those as being the figures set forth in this chart?

A. $228,645.18, $23,583.77, and $23,299.06; yes.

Mr. Fleming: Offer the chart in evidence, if the Court please, as Government's Exhibit 347.

Mr. Sullivan: Same objection, if your Honor please, that we made with regard to Exhibit 337, ask leave of Court to state it in that way without reiterating our grounds.

The Court: Same ruling. Objection will be overruled, received in evidence.

The Clerk: Government's Exhibit 347 in evidence.

(Thereupon the chart identified above was received in [2005] evidence and marked U. S. Exhibit No. 347.)

Q. (By Mr. Fleming): You see a scale of this chart indicated on the back? A. Yes.

Q. And give us the scale, please.

A. Three-fourths of an inch equals $5,000.

Q. Now, help me pin this chart up.

Now, I will direct your attention to the first black box and ask you to identify that. What is the figure $23,299.06 that represents the tax reported by Chin and his wife during the year 1945?

A. On the 1945 return.

Q. Now, the next black box, $23,583.77; what is that?

A. That is the tax reported on the 1945 returns of the Chin family.

(Testimony of Augustus V. Brady.)

Q. Now, what is this column, $228,645.19?

A. That is the tax liability on $298,153.48.

Q. Now, that column is partly in black down at the bottom. Can you identify the figure of $46,-875.83?

A. That is the tax reported by Chin Lim Mow and his family on the 1945 return.

Mr. Fleming: No further questions.

The Court: You prefer, Mr. Sullivan, to wait?

Mr. Sullivan: We are so short of time, I can go right ahead now, unless your Honor would [2006] prefer.

The Court: I was merely making the suggestion to you; you might want to organize your thoughts, perhaps.

Mr. Sullivan: Well, I thought I might be able to get some of this out of the way.

Cross-Examination

By Mr. Sullivan:

Q. Now, Mr. Brady, yesterday Mr. Fleming talked to you about the surtax brackets which were obtaining in 1945 in respect to the net income of individual taxpayers. A. Yes.

Q. You recall that you had before you at that time Exhibit 65, which I have handed you there?

A. That's right.

Q. I believe you told us that according to that exhibit and according to the rates of taxes appli-

(Testimony of Augustus V. Brady.)

cable to income for individuals in 1945 the rates were on a graduate basis; is that correct?

A. That is right.

Q. So that the higher the income the higher the rate, generally speaking? A. That's correct.

Q. Now, for example——

A. You want to use the exhibit?

Q. You have one of yours? A. Yes.

Q. I am sorry. For example, I will direct your attention [2007] to the surtax table, and just taking at random the figure of $16,000, do you find there what the surtax would be on $16,000?

A. Yes.

Q. And what is it, please?

A. It is $5,200.

Q. Well, technically, that is really for over $16,000, isn't it? A. No.

Q. I see, that is the calculation made——

A. And the excess would be fifty per cent in excess of $16,000.

Q. So the $16,000 we have a surtax again of what? A. $5,200.

Q. Now, if I, as an individual, have a net income in the year 1945 of $16,000, leaving out all other factors in the calculation, my surtax would be $5,200; isn't that correct?

A. You mean if your income was subject to surtax after exemptions?

Q. That's all. A. Yes.

Q. Now, do you find indicated on this chart

(Testimony of Augustus V. Brady.)

which you are reading here a percentage figure after the figure of $5,200? A. Yes.

Q. And what is that, what percentage is [2008] that?

A. Plus 50 per cent of the excess over $16,000.

Q. All right. Now, in plan language all that means is for every additional dollar I might have over the $16,000 the tax would be 50 per cent of it so far as the surtax here? A. That's right.

Q. It does not mean that the $16,000 was taxed at a fifty per cent rate, does it?

A. That's correct.

Q. And it doesn't mean that between the first dollar that I earned in 1945 and the 16,000th dollar that I earned there was a rate of 50 per cent applicable to any one of those dollars, does it?

A. No, being a graduate rate.

Q. Being a graduate rate going up?

A. Correct.

Q. Now, if in addition to the $16,000 which I earned I had an income for my wife of $16,000 and added them together and reached $32,000, what would the surtax be on the $32,000?

A. Filing one return, Mr. Sullivan?

Q. Filing one return.

A. Surtax on $32,000 would be $14,460.

The Court: You might clarify that, counsel. You said filing one return. By that do you mean filing a joint return of husband and wife, do you not, Mr. Sullivan?

(Testimony of Augustus V. Brady.)

Mr. Sullivan: Yes, your Honor, although I took Mr. Brady's [2009] question on it.

Q. What amount for the purpose of calculation that the income of the husband and wife would be included in a single return, without giving the benefit of a separate reporting on a community basis? Do you understand?

A. I understood you wanted to know the surtax on the whole $32,000?

Q. On the whole $32,000. What would be that again? A. It would be $14,460.

Q. Now, for the first dollar that was added to the $32,000 total tax, at what rate would that be taxed according to your schedule in 1945?

A. Sixty-five per cent of the excess over $32,000.

Q. And that would mean, generally speaking, that for each additional dollar that my wife and I put on a single return, instead of paying only fifty cents of it to the Government we would pay sixty-five cents of it to the Government; isn't that correct? A. That is correct.

Q. Now, Mr. Brady, suppose that by way of further illustration of this subject that you talked to Mr. Fleming about, the first four people in the jury box here and I were partners in a business, and the business had a net income of $50,000 in 1945, and instead of calculating all of the tax by distributing ten thousand to each of us, instead of doing that to include [2010] all of the income and put in on my shoulders, will you tell us how much the tax, surtax would be on the $50,000 in 1945?

(Testimony of Augustus V. Brady.)

A. Surtax on $50,000 is $26,820.

Q. $26,820. And if I had an additional dollar to put on top of the $50,000, tell me how much of the additional dollar I would then have to give the Government?

A. Seventy-five per cent of the excess over fifty thousand.

Q. All right.

Now, in the first example, I am taking as an illustration, an incident where you say, Sullivan, you have got all the $50,000, and I am going to calculate your tax bill. But now I am going to ask you to take an illustration where the first four people in the jury box and I go to a tax consultant and he files a partnership return and he says, Mr. Sullivan, I will distribute to you as your distributable share, $10,000, you being a one-fifth partner, and ten thousand also equally to each of your other four partners who have at one time sat in that jury box, and I say to him, now, tell me how much surtax I have to pay in 1945 on my share, because there was another instance where somebody tried to give me the whole fifty thousand.

Now, if that occurred, tell me the surtax?

A. Surtax on $10,000?

Q. Please. A. Be $2,640.

Q. And if I had an additional dollar of income that I put in [2011] that 1945 return that the tax consultant prepared for me, how much of the additional dollar in the second example would I have to pay to the United States Government?

(Testimony of Augustus V. Brady.)

A. Thirty-eight per cent of the amount in excess of $10,000.

Q. So it follows, does it not, Mr. Brady, by way of carrying out your illustration, that wherever you take income of several people and allocate it all to one person that naturally the tax is going to be higher, isn't it?

A. I wouldn't say that, Mr. Sullivan.

Q. If—— A. Because——

Q. Pardon me, I didn't mean to interrupt you.

A. Well, if you are just going to make a certain computation and arrive at a larger amount, you are going to have a higher surtax, but the allocation that would be—because of whether it would be factual or proper to do that.

Q. Of course, in this case you are not passing upon the facts? A. No.

Q. Are you?

A. No, but you are saying that assuming this.

Q. I am asking you to take my assumptions.

A. Yes.

Q. So will you kindly take my assumptions just as you took Mr. Fleming's assumptions? [2012]

A. Yes, surely. On your assumptions if there is a higher income subject to surtax it would be a higher rate.

Q. And if for example I took any one of the gentlemen in the jury box and I had an income of $30,000 and the gentleman's income was $20,000, and this was either calculated on a computed basis or it was reconstructed on a net worth basis, if

(Testimony of Augustus V. Brady.)

somebody says, Sullivan, this is all yours, and I am going to calculate it, I will have to pay more tax on the $50,000, naturally, than I would on the $30,000, wouldn't I? A. That's right.

Q. And in addition to that I would also have to pay a greater percentage of each additional dollar over $50,000 to the United States Government than I would if I only had a surtax bracket of $30,000?

A. That's correct.

Q. Now, as a matter of fact, if somebody in calculating my income of $30,000 had considered that I owned, or I had in their rents, dividends—Mr. Bailiff, I am out of chalk again.

I will name the rest. Rents, dividends, income from partnership, interest from my bank account—thank you. In the ordinary calculation you cannot say that the rents which are included in the $30,000 are taxed at a certain bracket, can you?

A. No, sir.

Q. And you can't say that the dividends are taxed at a certain bracket? [2013] A. No.

Q. They are all thrown into the same pot, aren't they? A. That's right.

Q. So that once I put all my income into the same figure and I arrive, for example, to take my first figure, at a net income for me alone of $50,000, then I pay a tax bill of $26,820, as far as the surtax goes; isn't that correct? A. That's right.

Q. And it cannot be said that if there are $20,000 worth of partnership income in here that it is taxed at the—what is the bracket on $50,000?

(Testimony of Augustus V. Brady.)

A. Seventy-five per cent.

Q. All right. And what is the next bracket below it? A. Seventy-two per cent.

Q. All right. For example, it cannot be said, can it, that the partnership income came in last and so that is taxed as the next highest bracket, the 72 per cent bracket, can it? A. No.

Q. As a matter of fact, from the standpoint of the Bureau of Internal Revenue it cannot be said in any way as to what the ingredients of the income are themselves if separately taxed, can it?

A. Well, there is an exception with capital gains.

Q. Aside from that, talking about income and not capital? A. Yes. [2014]

Mr. Sullivan: This might be a convenient time, if it meets with your Honor's approval.

The Court: Very well. We will take an adjournment, ladies and gentlemen, until 2 o'clock this afternoon.

Mr. Sullivan: Your Honor mentioned something yesterday about a night session tonight, and my only concern I have is with the witnesses, your Honor, which is a little bit of a problem. I have had them contacting me all day yesterday——

The Court: Well, I am going to defer decision on that until this afternoon.

Mr. Sullivan: Keep them waiting, your Honor?

The Court: Yes.

(Thereupon a recess was taken until 2 o'clock p.m. this date.) [2015]

Thursday, October 9, 1952, at 2:00 P.M.

AUGUSTUS V. BRADY

resumed the stand; previously sworn.

Cross-Examination
(Continued)

By Mr. Sullivan:

Q. Mr. Brady, I wonder if you would be good enough to look at the counterpart that you have there of the income tax rates, which is United States 65? A. Yes.

Q. Will you kindly assume that in the year 1945 we have an ordinary net income of $16,000 for a single man? Would you give me the amount of surtax that is carried on that printed form for that?

A. You want me to make a computation of the standard deduction, and so forth?

Q. No, let's take the computation——

A. (Interposing): Surtax on $16,000?

Q. Yes. A. $5,200, Mr. Sullivan.

Q. Now, let us assume, if you will, that instead of being single in 1945 I was married and my wife and I had the same income of $16,000, and we reported it $8,000 each on separate returns, as they did in those days. Would you kindly give me the surtax on $8,000? A. $1,960. [2016]

Q. And I assume my wife would pay $1,960, too; is that correct? A. That is correct.

Q. Then we would both pay the United States Government $3,920; is that correct?

(Testimony of Augustus V. Brady.)

A. That is right.

Q. So that instead of paying $5,200 in my report as a single man, if I were single, my wife and I now pay $3,920, which is a saving of $1,280; is that correct?

A. That is correct, by dividing the income and reporting in two returns.

Q. Yes. In other words, by virtue of splitting of that income, on those assumed facts, the United States Government has received $1,280 less money than it would in the first assumed instance?

A. Yes, it would be less tax on separate returns.

Q. Yes. Now, let's say that I am in a business and the total net income of that business is $50,000; and let's say that all that net income is charged to me rather than charged to myself and the four partners who also happen to be in the partnership which conducted the business. Can you give me under the first assumed instance how much I would pay if the $50,000 were charged to me alone?

A. You mean you want the surtax on $50,000?

Q. That is right. [2017]

A. It would be $26,820.

Q. Instead of charging the $50,000 to one of the partners as in my first assumed instance, will you kindly assume that each of the partners reported an equal one-fifth, or $10,000? Will you give me what the surtax would be on the divisible portion of the $10,000?

A. The surtax on $10,000 would be $2,640.

(Testimony of Augustus V. Brady.)

Q. And if five of us paid $2,640, we would have $13,200 as the total amount of money paid to the United States Government on the second assumed instance; is that correct? A. That is correct.

Q. So that in the instance that I ask you to assume where we have the partnership, the United States Government receives $13,620 less money than it would in the assumed instance where all the money was charged to one partner?

A. I don't quite follow you on that, Mr. Sullivan.

Q. I just ask you to assume, first, that all of the income is charged to one partner, $50,000, and you told me if that were so the surtax on that would be $26,820.

A. I think I answered that the surtax on $50,000 would be $26,820.

Q. I am only asking you for the surtax from your table on these amounts.

A. That is right.

Q. Without considering any other facts, for the sake of [2018] convenience. A. Yes.

Q. Upon the same assumption of facts with regard to the absence of other factors, I am asking you to, however, assume the $50,000 was reported or was distributed $10,000 to each of five partners.

A. Yes.

Q. And I asked you if that were done, if you would calculate for me from the table what would be the surtax on each of the $10,000 distributive share, and you told me it would be $2,640.

(Testimony of Augustus V. Brady.)

A. That is right.

Q. If each of the five partners then paid the same amount of $2,640, they would pay a total to the United States Government so far as surtax is concerned of $13,200? A. That is correct.

Q. So that under the second assumed set of facts the United States Government would receive $13,620 less money than it would if we assumed a situation where the entire $50,000 was chargeable to me?

A. That's right.

Q. All right. Now, generally speaking, Mr. Brady, if we assume that there is a marriage and the income is split, you are going to have less tax going to the government than if you did not have a marriage; isn't that correct? [2019]

A. Yes, by filing separate returns; yes, sir.

Q. Yes. A. Yes, of course.

Q. If you assume there is a partnership and the amounts of net income reported by the partnership on information returns are reported by the individual partners—if we assume that, we are going to have less tax paid the United States Government than if we assume there isn't a partnership; isn't that right? A. Yes.

Q. So that in any instance where the income is divided upon facts similar to the facts I have asked you to assume, it must follow from the schedule that less money will go to the United States Government; isn't that true? A. That is correct.

Q. Now, you told Mr. Fleming that you had pre-

(Testimony of Augustus V. Brady.)

pared some schedules and that the purpose of the schedule, generally speaking, was to indicate certain calculations that you have made or did make with respect to net income involved in this case upon a net worth basis? A. That's right.

Q. And Mr. Fleming asked you some questions for the purpose of illustration about the net worth method; do you recall that? A. Yes.

Q. I wonder if you would be good enough to go over with me some illustrations that I might have? Let's assume that at [2020] the beginning of the year 1944 I had assets consisting of, say, $2,000 and liabilities consisting of $1,000, then my net worth would be $1,000, would it not?

A. That is correct.

Q. And for purposes of convenience we will take the last day of the year; isn't that correct?

A. Usually it is.

Q. Usually it is. All right. Let's assume, further, that on the last day of 1945 my net worth was $10,000. If I subtract the $1,000 from the $10,000, I have what is known as an increase in net worth, do I not? A. That is right.

Q. And that would be—— A. $9,000.

Q. $9,000. And assume for the purposes of this illustration, if you will, Mr. Brady, that we are talking about me and I have given you an assumed state of facts where I am worth $1,000 at the beginning of 1945 and $10,000 at the end of 1945. We have calculated, then, I have an increase in my net

(Testimony of Augustus V. Brady.)

worth during the year 1945 of $9,000; is that correct? A. Yes.

Q. Now, you have told us that where there are any non-deductible expenditures made during the year, it is part of the net worth method of calculation to add that to the increase?

A. That is right. [2021]

Q. And that is done on this basis, is it not, that if I spent, for example, $5,000 on a trip to Honolulu, I am not entitled to deduct that, am I, from my income purposes? A. Well——

Q. Say it is a pleasure trip.

A. Pleasure trip.

Q. And if that is so, the money had to come from money inside the year 1945?

A. That is correct.

Q. And since it came out of that year 1945, you have to put it back in the year 1945?

A. Correct.

Q. So let's assume that I did go to Hawaii, and that money was expended, and that is for pleasure, and it costs $5,000, then your examination of my income tax liability so far as amounts to this year that you have found that I have a net worth increase as adjusted by non-deductible expenditures for the year 1945 of $14,000.

A. Assuming the facts you have told me, yes.

Q. Well, I am only giving you a hypothetical case. A. Yes.

Q. Based on the assumption I gave you. You understand that? A. Yes.

(Testimony of Augustus V. Brady.)

Q. That is similar to Mr. Fleming's treatment of you, wasn't it? He gave you hypothetical cases, did he not? [2022] A. Yes.

Q. All right. Now, you are interested in whether or not I have a liability to the United States Government, so as an examining agent you pick up my return and you find—strike that last part. What do you look for on my return as the last item which you put into your calculations?

A. Net income reported.

Q. All right. And let us assume that you find on my return that I have reported $14,000, then have you not done what you accountants and revenue agents call—have you not done a reconcilement of my increase in assets against my reported income? A. Yes.

Q. This is what is known as a reconciliation, is it not?

A. Could be called that, yes, Mr. Sullivan.

Q. Don't you accountants call it that quite frequently?

A. Well, we call it a computation, and of course if it comes with—we would show them that there would be no understatement.

Q. All right. Now then, on the basis of this method—withdraw that. Incidentally, this is an accountant's method, is it not? A. Yes.

Q. And you have to observe certain principles of accountancy, don't you? [2023] A. Yes.

Q. You naturally, being an accountant—accountancy is a profession, is it not? A. Yes.

(Testimony of Augustus V. Brady.)

Q. And you have to follow certain applicable principles of your profession as his Honor and I do in ours; is that not correct? A. Yes.

Q. Now, it is also a tax practice, isn't it?

A. What is a tax practice?

Q. The application of the net worth method to the computation of income. A. Yes.

Q. It is practiced by revenue agents?

A. Sure.

Q. So it becomes a tax practice? A. Yes.

Q. Now, the first important thing, then, in my illustration that I gave you is that which I will mark "A," the $1,000, is it not?

A. That is right.

Q. And what do you call that, tell the ladies and gentlemen of the jury.

A. Net worth at the beginning of the period.

Q. Isn't that frequently called the starting point? [2024] A. Yes.

Q. Have you as the technical advisor to the Penal Division of the general accounting office read any literature where you have heard that referred to as the starting point? A. Yes.

Q. Now, under my set of facts that I gave you in this illustration, I have given you an absolutely complete and accurate starting point, haven't I?

A. Yes.

Q. I have told you I don't own a thing in the world other than, nor have I any other liabilities than what I have stated, and my net worth is

(Testimony of Augustus V. Brady.)

$1,000; isn't that correct? A. That is correct.

Q. The next important factor in this formula is the figure of adjusted net worth that you come down to before you make your reconcilement, is it not?

A. Well, I think you want to get the starting and the ending, Mr. Sullivan.

Q. All right. A. $10,000.

Q. We will take the ending. A. Yes.

Q. That is step 2, the ending? A. Yes.

Q. I wanted to do it more briefly, but we will do it your way. [2025] And having established the ending, then the third point would be the increase?

A. That's right.

Q. And the fourth point would then be the increase as you would adjust it by any adjustments, plus or minus, as you told Mr. Fleming?

A. That is correct.

Q. Now, this figure which you end up with, and which is $14,000 in my illustration, is it an income figure or is it a tax figure?

A. I would say that would be a tax figure.

Q. The $14,000, Mr. Brady?

A. Net taxable income, yes.

Q. Then it is an income figure? A. Yes.

Q. It isn't taxes paid? A. No. No.

Q. It is, then, an income figure?

A. Net taxable income.

Q. All right. When I said, "Is it an income figure?" I meant is it an income figure as distinguished from a figure of tax paid on income. That is what I meant. Do you understand?

(Testimony of Augustus V. Brady.)

A. One you pay tax on.

Q. Yes, pay tax on? A. Yes. [2026]

Q. So that on that basis it isn't a tax figure, but it is an income figure? A. That is correct.

Q. Now, under the accepted accountant's formulas of net worth method, you must compare, match or reconcile this figure with an income figure?

A. Yes.

Q. And that income figure is the reported income on the return? A. That is right.

Q. So that the important step here, then, the first step, is the assurance that you have an accurate and complete starting point; is that right?

A. Well, we try to get the net income, the starting point, as accurate as we possibly can.

Q. I am not talking about what you try to do; I am talking about your formula for that.

A. Yes.

Q. As an accountant's formula. A. Yes.

Q. All right. If in any of those net worth figures that you have there in my illustration you subsequently found that assets were omitted or liabilities were omitted, then the net worth figure would be erroneous, wouldn't it?

A. Well, it would be changed, yes.

Q. Well, in its present form it would be [2027] erroneous? A. Yes.

Q. And if this figure were erroneous, all of the calculations down, up to the point of reconcilement, would likewise have to be adjusted, wouldn't they?

A. Correct.

(Testimony of Augustus V. Brady.)

Q. And similarly, if you found that there had been included which should not have been included at 12/31/45, or assets omitted which should have been included, that figure then would be erroneous, wouldn't it? A. That is correct.

Q. And that affects the entire calculation down to the point where you were going to make your reconciliation with reported income?

A. That is correct.

Q. Now, let's take a situation, Mr. Brady—oh, strike that and let me ask you this question: I am sure the figures are fresh in your mind. In the assumption I gave you, you compared the $14,000 figure which was used as an illustration as my net worth increase, or net income—net taxable income as adjusted on a net worth basis, you compared that figure with an income figure on whose tax return?

A. On your tax return.

Q. And nobody else's; isn't that right?

A. That is right, unless you had somebody else reporting income for you that belonged to [2028] you.

Q. I didn't give you that yet. A. No.

Q. Let's take this situation now: Supposing we had an ABC partnership, and assume a state of facts wherein at 12/31/44 the net worth of that partnership was $5,000, and at 12/31/45 the net worth of the partnership is $10,000; and assume, further, that there had been no drawings from the partnership during the year. Have you those assumed state of facts in mind, Mr. Brady?

(Testimony of Augustus V. Brady.)

A. Yes.

Q. Now, let's say, assume further that there were five partners in the partnership. Taking the first part of the illustration, can you tell me, based upon that assumed state of facts, whether there had been a net worth increase in the partnership investment, first? A. Yes.

Q. And how much is that? A. $5,000.

Q. And you get that by subtracting the 12/31/44 from the 12/31/45; is that correct?

A. That is right.

Q. Now, let's assume that each of these partners reported on their income tax return $1,000 as their share, distributive share of the ABC partnership. Have you that assumption in mind? [2029]

A. Yes.

Q. Now, let's assume that you are investigating partner "A," and in making this calculation of net worth you have charged partner "A" with all of the assets of the partnership and all of the increase. Have you that assumption in mind?

A. If I were making the examination, Mr. Sullivan, you say?

Q. I am just assuming that.

A. If I were making it——

Q. I am not asking what you would do.

A. I thought you said——

Q. No, I am asking you to assume. We will start all over again. A. All right.

Q. Assume that upon your calculation of the net

(Testimony of Augustus V. Brady.)

worth the entire investment in the partnership is charged to one of the partners, partner "A"; is that correct? Can you bear in mind that assumption?

A. Well, if it is a legitimate partnership I cannot see why it should all be charged to one partner.

Q. Mr. Brady, I am just asking you to take an assumed state of facts. Will you assume that one of the partners in the partnership, please, is charged in a net worth statement with the entire investment and increase of the partnership equity? Will you assume that, please? A. Yes. [2030]

Q. All right. Let's assume further that there were no adjustments to the net worth increase of $5,000. A. Yes.

Q. So, so far as this analysis goes, the net taxable income to be reconciled is the reported income of $5,000; isn't that correct?

A. According to your theory, yes.

Q. All right. Now, if you reconciled the $5,000 against the tax return of partner "A" only, it wouldn't reconcile, would it?

A. That is right.

Q. In order to reconcile this investment in this partnership upon my assumed state of facts, the increase in this net worth, you would have to reconcile it with all of the returns and all of the reported incomes of the five partners, wouldn't you?

A. Well, you would have the difference of $4,000 that hadn't been reported by partner "A."

(Testimony of Augustus V. Brady.)

Q. Exactly. If you reconciled the $5,000 with the return of partner "A" alone, it would show $4,000 unreported income, wouldn't it?

A. That is right.

Q. So that to reconcile it properly, so long as you are charging all the income to "A" under my assumed state of facts, you would have to reconcile the $5,000 with the reported income of all the partners, wouldn't you?

A. To account for the $5,000. [2031]

Q. Yes.

A. If you wanted to see how it was divided, yes.

Q. If you did that, you would in this example, then, find that the $5,000 increase in net worth had reconciled with the reported income from the co-partnership as reported by the five partners, wouldn't you?

A. Well, you would find whether it was distributed by looking at the other partnerships, yes.

Q. Now, in applying the net worth formula, then, Mr. Brady, it is essential from an accountant's point of view, is it not, that there be a clear and accurate starting point?

A. From an accountant's point of view you do—you get the starting point as clear and as accurate as is possible to determine.

Q. Aside from what might be the——

A. (Interposing): Accepted theory?

Q. I will withdraw that. You, as a professional accountant, would not approve of a starting point

(Testimony of Augustus V. Brady.)

for a net worth formula that was not clear or accurate, would you?

A. If I was certain that it wasn't clear, I would suggest it be as clear as possible, yes.

Q. Then if you found it was neither clear nor accurate, you would not adopt is as a starting point of a net worth formula in accordance with accepted principles of accountancy, would you?

A. No. [2032]

Q. And then the next big step in the net worth method is the final figure for taxable income on the net worth basis, is it not, disregarding those minor steps that we talked about? A. Yes.

Q. Now, incidentally, you have used net worth basis, I have used net worth basis, your charts have net worth basis, Mr. Fleming uses net worth basis; when we use that as accountants, or you use that, you're referring to a basis which is a reconstructed basis, isn't it? A. Yes.

Q. In other words, if you as a revenue agent walked into my office and found that I had an entry for $5,000 for services in my books and you picked up my tax return and you found that it wasn't on my tax return, that would be a direct basis for asserting it a deficiency, wouldn't it?

A. That being the only item.

Q. That being the only item?

A. Being the specific item, yes.

Q. Of course, as a revenue agent, if you walked in and you also found in my books a number of

(Testimony of Augustus V. Brady.)

deductions, you would probably allow me for the deductions, too, wouldn't you, against the $5,000?

A. If we were computing the deficiency on the basis of specific items, yes. [2033]

Q. Yes. So that generally speaking the Revenue Service uses two methods of computing deficiencies, do they not? They use what is called a computed method and use what is known as a reconstructed or secondary method; is that right?

A. Well, we refer, probably, to it as specific item.

Q. A specific item method? A. Yes.

Q. Now, that is a primary method, isn't it?

A. Yes.

Q. And the net worth method is a secondary method?

A. Well, we might use the net worth to substantiate——

Q. Might use both of them? A. Yes.

Q. Yes, you might use both of them?

A. That's right.

Q. Then the third step, to come back to these three steps, would be the reported income in the example I have given on my return; isn't that correct? A. That's correct.

Q. Now, you would then, in following this method, have to preserve a consistency, would you not, to see that up here where you figure out the net worth you're talking only about my assets and liabilities; isn't that correct?

A. That is correct.

(Testimony of Augustus V. Brady.)

Q. And where you are talking down here about the reported [2034] income you're only talking about my reported income? A. Correct.

Q. So that there must be a consistency, must there not, between the accountancy and the tax practice? A. Yes.

Q. Now, you have prepared a number of schedules here, Mr. Brady, which you have discussed with Mr. Fleming, and I am referring now to Exhibits 337 through 344 and all the supporting exhibits which were mentioned in the record during the examination of you by Mr. Fleming. You, of course, have all those in mind? A. Yes.

Q. Let me ask you, do you have some facsimile of them there?

A. I believe I do. If you call them out I can see if I have a copy of it.

Q. Now, Mr. Brady, as I understand it, you prepared yourself all of these that I have mentioned, and of course I don't mean that you typed them out—prepared them in the sense of preparing the material for them?

A. Yes, I prepared them under the directions of Mr. Fleming.

Q. Now, to refer you, for example, to Exhibit 337, which reads, "Net worth statement at December 31, 1944, and December 31, 1945"——

A. Yes.

Q. ——did you make the various entries, each of the various [2035] entries on that exhibit which you see before you—withdraw that.

(Testimony of Augustus V. Brady.)

With respect to each of the entries on this Exhibit 339 did you put them all there because Mr. Fleming told you to? A. Yes.

Q. Is it your testimony, then, that the basis of the inclusion of each entry on Exhibit 339 is a direction to you by counsel for the Government to put the entry on the paper? A. Yes.

Q. Would your testimony be the same with respect to Exhibit 337 which has to do with the net worth at December 31, 1941? A. Yes.

Q. Would your testimony be the same with respect to all of the exhibits which you discussed with Mr. Fleming and all the supporting schedules which you discussed with him? A. Yes.

Q. Did you follow his directions in each case whether or not you yourself felt that they were in accordance with the accepted principles of accountancy?

Mr. Fleming: I object to that question, your Honor; argumentative.

The Court: Overruled.

Mr. Fleming: This witness was put on to——

The Court: I ruled, counsel.

Mr. Fleming: Yes, your Honor. [2036]

The Court: You have the question in mind?

The Witness: No.

The Court: Will you read it, Mr. Reporter?

(Last question read by the Reporter.)

A. I felt that they were——

Mr. Fleming: May it please the Court, may I be

(Testimony of Augustus V. Brady.)

heard on that matter? And call your Honor's attention to a citation? I raised the question because this might possibly open up an extended field of inquiry and I would like to call attention to your Honor's precedence on the subject.

The Court: Very well. The answer will be stricken pending the argument upon the objection.

Mr. Fleming: I have here a memorandum with the citation from the case of United States against Schenck. The language which I would like to present to the Court, a copy for counsel, directing your attention to the—after your Honor has read the quotation.

This witness is offered as a summary witness of the Government's contention. I believe it is correct to say that in each case in the charts which he testified about he testified they were made up pursuant to my direction and at my request. He is offered only as a witness to present the Government contentions.

The Court: The question is now——

Mr. Fleming: So his personal opinion [2037] is——

The Court: No, that isn't the question; that isn't the question. The question is, if I am correct—if I am wrong, correct me, both of you—is whether or not he accepted your directions regardless of whether he thought the directions which you gave him were or were not in accord with good accounting practice.

Mr. Sullivan: Exactly, your Honor.

(Testimony of Augustus V. Brady.)

Mr. Fleming: That is asking for his opinion.

The Court: Well, I am going to overrule the objection. I don't see this case gives you any aid or comfort whatsoever. The objection will be overruled. You may proceed, Mr. Sullivan.

Q. (By Mr. Sullivan): Would you like to have the question read again? A. Yes.

Mr. Sullivan: May I have the question read, your Honor?

The Court: Yes.

(Question read by the Reporter.)

The Court: You have already answered the question which I struck from the record.

A. I felt they were in accordance with accounting principles.

Q. (By Mr. Sullivan): First of all, May I have a yes or no answer to the question: Did you follow the directions of Mr. Fleming regardless of whether or not you felt they were——

Mr. Fleming: That question assumes there is a conflict and I submit it is not susceptible to a yes or no answer. [2038]

The Court: Overrule the objection.

A. I can't see where the conflict was there.

Q. (By Mr. Sullivan): Would you just answer that yes or no? Did you follow his directions?

A. I followed his directions, yes.

Q. Now, your further statement is that you felt that each of the entries was in accordance with good accounting practice? A. Yes.

Q. Are you in doubt about that.

A. I said yes.

(Testimony of Augustus V. Brady.)

Q. I thought by the inflection of your voice——

Mr. Fleming: I object to that as argumentative, if the Court please.

The Court: All right, disregard it, ladies and gentlemen.

Q. (By Mr. Sullivan): Now, upon Mr. Fleming's direction, Mr. Brady, did you satisfy yourself that the references you gave in the various exhibits —I am now referring to all the exhibits supporting the entry that you put down——

Mr. Fleming: If the Court please, that is asking for the witness' opinion whether he satisfied himself or not.

Mr. Sullivan: Asking for a physical act.

Mr. Fleming: That in the Schenck case that question is objectionable, not covering matter purportedly set forth by the Government exhibits in the presentation of this witness. [2039]

The Court: Overruled.

A. I took Mr. Fleming's instructions in regard to the amounts and references, and exhibits.

Q. Well, did you yourself look at the transcript?

A. In some instances, yes.

Q. Did you yourself examine the exhibits?

A. Yes.

Q. Well, did you satisfy yourself from an examination of the exhibits or the evidence, wherever you had examined them, that in those instances the references supported what you put down on the paper?

A. I believe so. I would say substantially so.

(Testimony of Augustus V. Brady.)

Q. Now, do you recall any instances where you put down an entry and there wasn't, it wasn't supported by the evidence?

A. Not that I can think of offhand, Mr. Sullivan.

Q. Now, Mr. Brady, I think you told me that in a net worth calculation if you omitted any assets at the beginning of the period, for example, that should have been included your whole calculation would be subject to change, wouldn't it?

A. That's correct.

Q. And if conversely at the end of the period you had put in assets which shouldn't be put in there, then your whole calculation would again be subject to adjustment? A. That's right.

Q. And I think you told me in my illustration that the purpose [2040] of this net worth method as used by you accountants in the Treasury Department is to reconcile an increase against reported income, is that right? A. Yes.

Q. Now, tell me first of all, and I will direct your attention to Exhibit 339, which is a net worth statement for '44 and '45, tell me first of all, if you will, if you, in preparing this exhibit, included assets belonging to people other than the defendant Chin Lim Mow? A. Not to my knowledge.

Mr. Fleming: If the Court pleases, that is the ultimate question of fact for the Jury. He is attempting to elicit an opinion from this witness. This witness was not presented for an opinion—merely presented as having prepared certain tabulations at my direction.

(Testimony of Augustus V. Brady.)

The Court: Overruled.

Q. (By Mr. Sullivan): May I have your answer?

A. Not to my knowledge I didn't. There again I might state that these figures that I inserted on this schedule were done under direction of Mr. Fleming.

Q. Well, are you placing the responsibility now on Mr. Fleming for their entry here, or are you taking it?

A. No, I am not taking the responsibility for these figures. I was instructed to make certain computations which Mr. Fleming asked me to do and that is what I did. That is all these [2041] represent.

Q. Mr. Brady, have you before you there—I have Exhibit 278 in evidence, it may not be the number—but it is entitled "Supporting schedule detail of cash," is that it?

A. I got 345, Mr. Sullivan.

Q. 345, is it? A. Yes.

Q. That's detail of cash?

A. That's correct.

Q. Now would you kindly read for me on the schedule detail of cash, read for me the names on the first bank account which appears on that schedule? A. Chin Sue Ngor and Wong Ying.

Q. Now, do you identify Wong Ying as the wife of the defendant? A. Yes.

Q. Do you identify Chin Sue Ngor as the daughter of the defendant?

A. I don't, no. That was an item as I mentioned I was instructed to include that item and that has

(Testimony of Augustus V. Brady.)

been stipulated to, as I understand, by you.

Q. No, I only stipulated to the amount in the bank account, I didn't stipulate that the daughter's bank account was Mr. Chan's bank account. Did you examine my stipulation?

A. Well, yes, the amounts were read off to me.

Q. If you will examine it you will find I did not stipulate [2042] to it, Mr. Brady, take my word for it.

You find a bank account then in the name of the daughter and wife as your first entry?

A. Yes.

Q. Now, do you find as your second entry on this—what do you find there?

A. Wong Ying and Bertha Chan.

Q. Bertha Chan is the daughter, isn't she?

A. Yes.

Q. How about the third item?

A. Wong Ying and Bertha Chan.

Q. That is the daughter again? A. Yes.

Q. The next item is what?

A. B. H. Chan and Wong Ying.

Q. That is the husband and wife?

A. That's right.

Q. Now, the next item?

A. B. H. Chan and Ying Wong Chan.

Q. That's the husband and wife?

A. That's right.

Q. And the next account?

A. John J. Allen, Jr., trustee account.

Q. And the next account?

A. Admay Company. [2043]

(Testimony of Augustus V. Brady.)

Q. You're familiar with Admay Company?

A. No, sir, I am not.

Q. You remember, you were sitting here in court during the trial, of course? A. Yes.

Q. You heard its name mentioned?

A. Yes.

Q. Now, I will show you Exhibit 13, Admay Company partnership return of income, and ask you to read off to me the name of persons who are reported as partners in that return?

A. According to this partnership return the partners' shares are May Taam, Janet Chan, Bertha Chan, Alvin Chan, Chin Lim Mow and Norman Chan.

Q. Now, the next one is Wong Ying Chan. Mrs. Chan, is it not? A. That's right.

Q. Now, how about the next one?

A. Wong Ying Chan.

Q. After that?

A. Chin. Wong Ying, May Sue Chan, and Janet Chan.

Q. Now, Wong Ying is Mrs. Chan and Janet Chan are the daughters, are they not?

A. Yes.

Q. All right. Now, then is it a fact here that you have incorporated in your various schedules all of the bank accounts which are set forth in your Exhibit 345 irrespective of in [2044] whose names that appear on that exhibit?

A. That's correct.

Q. That is included in your net worth calculation? A. That's right.

(Testimony of Augustus V. Brady.)

Q. Is that right? Do you find any place on Exhibit 339—I will direct your attention to Exhibit 339 and ask you if you find there an entry on your balance sheet for the Tai Sun Company?

A. Yes.

Q. I will show you Exhibit 23 in evidence, the tax return of Alvin Chan, and ask you if you find on there income reported from the Tai Sun Company? A. Yes.

Q. And I will show you Exhibit 29, the tax return of Norman Chan, and ask you if you find on there the income reported from the Tai Sun Company? A. Yes.

Q. Now, have you included in your balance sheet a figure representing the investment of either Alvin Chan or Norman Chan in the Tai Sun Company?

A. I don't know if they have an investment in there.

Q. Well, do you know if you have a figure in there?

A. It is reported here, doesn't necessarily say they have an investment in there.

Q. If you pick up income in a tax return it is a pretty good [2045] lead, isn't it, that there is an asset from which the income comes?

A. If the income had been reported correctly.

Q. All right. Now, my only question is your net worth computation, your balance sheet, rather, contains any entry representing an investment of either Alvin Chan or Norman Chan in the Tai Sun Company? A. No.

(Testimony of Augustus V. Brady.)

Q. Now, you mentioned to me a little while ago that as far as the bank accounts were concerned you have included the bank accounts which are in the children's name as well as those which are in the names of Mr. Chan and his wife; isn't that correct?

A. That is correct.

Mr. Fleming: I don't believe there was any such testimony, your Honor. Testified he has included bank accounts in the stipulation, he hasn't testified he has included the bank accounts in the children's name.

The Court: I will allow the question.

Q. (By Mr. Sullivan): Now, did you also include in the—strike that.

By reference to Exhibit 339, can you tell me whether you included the war bonds which were registered in the names of the children?

A. As far as I know they were not. [2046]

Q. They were not included. Now, aside from the war bonds and aside from the bank accounts and disregarding personal clothing and furniture, have you included in your balance sheet any other assets of May Taam, the daughter of the defendant?

A. Not to my knowledge.

Q. Aside from—except making those exceptions I just did, namely, war bonds, personal clothing, furniture and bank accounts, have you included in any of your balance sheets which you have discussed with Mr. Fleming any assets belonging to Wu Taam?

(Testimony of Augustus V. Brady.)

A. I don't know as if we have. I don't think we have.

Q. Norman Chan?

A. I don't believe we have.

Q. Norma Wong Chan?

A. I don't believe we have.

Q. Alvin Chan? A. No.

Q. Bertha Chan? A. No.

Q. Janet Chan Lee?

A. Not to my knowledge we haven't.

Q. Ada Chan? A. No.

Q. Wurley Wong?

A. Well, unless some of this property was carried under the [2047] name of Wurley Wong, it might be.

Q. Madeline Chan?

A. Not to my knowledge.

Q. Eleanor Chan?

A. Not to my knowledge.

Q. Mrs. B. H. Chan?

A. Yes, Mrs. B. H. Chan and Mr. B. H. Chan; this net worth represents the combined net worth of both husband and wife.

Q. Does it include assets carried in the name of children? A. As far as I know, yes.

The Court: This might be an opportune time to take a recess. Take a recess for a few minutes, ladies and gentlemen of the jury.

(Short recess.) [2048]

(Testimony of Augustus V. Brady.)

Q. (By Mr. Sullivan): Mr. Brady, referring to your balance sheets again which indicate net worth at—that is, assets and liabilities at December 31, 1941, and December 31, 1944, and December 31, 1945, with the exception of the personal clothing and furniture and war bonds, are there any assets standing in the name of any of these following persons which, to your knowledge, stand in both names and you have not put in your exhibits: May Taam, Wu Taam, Norman Chan, Norma Wong Chan, Alvin Chan, Bertha Chan, Janet Chan Lee, Ada Chan, Worley Wong, Madeline Chan and Eleanor Chan?

A. Mr. Sullivan, I might say that this net worth statement that I prepared was done under the direction of Mr. Fleming. The items that appear on here I did not verify each individual myself, so I wouldn't know whether assets that might be owned by the defendant were carried under other names. These items were put down under instructions.

Q. My question is this, Mr. Brady: With respect to these names, these 11 people whose names I have read to you, are there to your knowledge any assets with those exceptions that I gave you carried under their names which you have not put in?

A. Not to my knowledge, no.

Q. Now I show you the exhibit 1, the defendant's 1945 income tax return, and ask you to examine the attachment; and I will direct your attention to—well, I will ask you if [2049] you find reported on the return an item of income from American-4?

A. Yes.

(Testimony of Augustus V. Brady.)

Q. Do any of your balance sheets or schedules include an entry for American-4? A. No.

Q. I will ask you to examine that same exhibit and tell me if you find that there is an item of income from Chan Company, Emeryville? Do you see that? A. Yes.

Q. Do any of your exhibits, that is, Exhibits 333 through 345 and supporting exhibits, included an entry for Chan Company of Emeryville?

A. Mr. Sullivan, you are asking me to compare income with an investment. It could be possible Mr. Chan had no investment there but did derive some income from it.

Mr. Sullivan: I move to strike what could be possible as a conclusion and opinion of the witness. I am only asking certain physical facts concerning these papers, if your Honor please.

A. But you are asking me to compare two different sets of figures.

The Court: Motion granted and the jury is instructed to disregard it.

Q. (By Mr. Sullivan): I am just asking you to answer my [2050] question yes or no, Mr. Brady.

A. I do not see an investment for the American-4 for the Chan Company on this statement.

Q. Now, I will direct your attention to the Hing Wah Tai. Do you find that on Exhibit 1 reported as an item of income?

A. For what year, Mr. Sullivan?

Q. I will show you——

(Testimony of Augustus V. Brady.)

Mr. Sullivan: Have you got Exhibit 58, Mr. Clerk?

Mr. Fleming: May we have the last question answered?

Mr. Sullivan: He says no, it isn't on here.

The Court: Did you answer the question, Mr. Brady?

A. I say I do not see it here, your Honor.

Q. (By Mr. Sullivan): I will ask you to examine 251, Mr. Brady, which is the 1945 partnership return of income for Hing Wah Tai, and direct your attention to the partners' distributive share and in particular to the fourth line, Chan Churk Kwen, $317.50. Do you see that there?

A. Yes, I do.

Q. And Chan Churk Kwen has been identified by the Government in this case as the name of Chin Lim Mow, do you recall that? A. Yes.

Q. Do you find on any of those exhibits an entry for Hing Wah Tai?

A. Yes. In 1941, see, partnership interest in Hing Wah Tai, [2051] $1,250.

Q. All right, now, tell me the year of the partnership return you just picked up the income item from?

A. This is a 1945 partnership return.

Q. Now, do you find an entry for—either an entry of an asset item or liability item either at December 31, 1944, or December 31, 1945, on any of your schedules or exhibits? A. No, I do not.

Q. You have, of course, Exhibit 339, Mr. Brady,

(Testimony of Augustas V. Brady.)

or do you have an entry with respect to the Lions Den? A. Yes.

Q. Now, is that the same property as the Kwo Hing Wah building? Do you recall that, sitting here in Court?

A. Yes, I think it has been referred to the same property. On the 1947 return there is an investment there of $25,000 as cost at the time it was sold, as the—1947, Mr. Sullivan?

Q. No, I am going to ask you about 1945.

A. I mean that is where we got the figure from.

Q. That is where you got the figure from?

A. Yes.

Q. All right. Now, is that figure which you have included a figure for the building or for the Kwo Hing Wah partnership?

A. That figure was taken from the 1947 return as Mr. Chan's investment in the Lions Den property as just—if I may see the 1947 return I could explain it better for you, Mr. Sullivan. [2052]

Q. All right, I will get it for you in just a minute. I show you Exhibit 10, which is the tax return which you have requested (handing document to the witness).

A. Yes, here it is shown on the 1947 return. He has "946 Grant Avenue, cost 1943, $25,000."

Q. From your examination of that return, tell us if that does not represent a building?

A. It would appear so.

Q. It does not represent an investment in a partnership equity, does it?

(Testimony of Augustas V. Brady.)

A. We haven't got it recorded here as an investment. We have the return, the 1947 return, $25,000, and that is what we have here as cost.

Q. And that refers to an asset value for a building, doesn't it?

A. That I wouldn't, except reading this return, I wouldn't know.

Q. Don't you remember the testimony of people that came in from the Tai Company establishing the cost of the building, the Lions Den building, and the number of tenants, one-half of the title was in one-fifth and the other half of the title was in fifths, and the first group of five sold to the second group of five? Don't you remember that testimony from Mr. Tom Roscoe? [2053]

A. I remember something like that.

Q. All right. I am asking you if the entry of that on your balance sheet, exhibit 339, if those figures represent an asset which is a building? Does that represent an investment in a partnership?

A. On this statement here we have it Mr. Chin Lim Mow's investment in the Lion's Den at $25,000. We have the sale in 1947 of $25,000 representing the same property.

Q. All right. It is talking about property, then?

A. Well, yes.

Q. Sale of property?

A. Well, this is property here.

Q. So that your entry in exhibit 339 represents the cost of a piece of property, isn't that correct?

A. As far as I can see here, it does.

(Testimony of Augustas V. Brady.)

Q. As a matter of fact, you are picking it off the capital gains schedule, aren't you?

A. That is right.

Q. I show you now exhibit 253 and ask you if this is the partnership return of the Kwo Hing Wah? A. Yes.

Q. Do you have any place on your exhibits an entry reporting the defendant's investment in the Kwo Hing Wah Company?

A. Not as such. We have it as the Lion's Den.

Q. That is merely an investment in a building, you told me, [2054] isn't it?

A. Well, Mr. Sullivan, I think I will have to come back to my statement that I mentioned before, that I did not make an investigation of this case. I merely made this computation based upon the instructions from Mr. Fleming.

Q. Yes. Now—pardon me, Mr. Brady.

A. He told me to put down $25,000 for investment in the Lions Den.

Q. Mr. Brady, all I am asking you is whether you find on that or can find for me on a schedule—do you know what I am driving at? A. Yes.

Q. And your answer is you don't have that, that you have included the investment in the Kwo Hing Wah Building in any of your schedules, under the Kwo Hing Wah co-partnership?

A. Under that name, yes.

Q. Can you find any other name it is included under?

(Testimony of Augustas V. Brady.)

A. I think it has been referred to as the Lions Den.

Q. You told me that was the building, didn't you?

A. Lions Den is the—possibly that is another name for Kwo Hing Wah Company.

Q. Look, Mr. Brady, you are an accountant. Isn't there a difference between an investment in an asset and an investment in a partnership?

A. Well, if the partnership asset is just one item, for [2055] instance the partnership was just ourselves, that would be the one asset.

Q. If you and I were in a co-partnership in a grocery store and building, and including the cost of the building only, it would be only included in costs of assets, wouldn't it?

A. If I owned the building and you didn't contribute—if I contributed the building, it would be my investment.

Q. Let's suppose we have equal contributions in the co-partnership.

Mr. Fleming: Well, if it please the Court, I submit this entire line of questioning is argumentative.

The Court: I find it very interesting and I think the jury will, too.

Q. (By Mr. Sullivan): Let's assume, Mr. Brady, for the sake of my illustration, that in this case the contributions are equal to the co-partnership and the co-partnership owns the building.

A. Yes?

(Testimony of Augustas V. Brady.)

Q. Let's assume the cost of the building is $50,000. If we are equal partners and there are two of us we might break down the cost of the building as being $25,000 each, isn't it?

A. That is right.

Q. But we would still have to audit the partnership to find out what our equity in the partnership was, wouldn't we? A. Yes. [2056]

Q. That is all I am asking here. Have you done that?

A. No, I didn't do that, Mr. Sullivan.

Q. All right. Now, I will show you exhibit 7, which is the 1944 return of the defendant. Do you find on there an item of income from a source called America? A. Yes.

Q. Tai Foy, spelled T-a-i F-o-y? A. Yes.

Q. Fook Chin, spelled F-o-o-k C-h-i-n?

A. Yes.

Q. Lucky, spelled L-u-c-k-y? A. Yes.

Q. Do you find entries on any of your schedules reporting investments, assets or liabilities in connection with any of those? A. No.

Q. Now, by way of illustration, Mr. Brady, if, for example, there were an investment of $100,000 in any one of those companies, or in any company by the defendant, at December 31st, 1944, that would increase his opening net worth, wouldn't it?

A. Yes, I think so, if you are assuming, Mr. Sullivan, we could assume that was opened and closed during the year and there is some income from the source, probably you——

(Testimony of Augustas V. Brady.)

Q. You don't know whether it is open or not, do you?

A. You are assuming something, too, Mr. Sullivan. [2057]

Q. In other words, you don't know either way, whether it was opened at December 31, 1944, or December 31, 1945, do you?

A. That is correct.

Q. And you haven't any calculation in any of your balance sheets at December 31st, 1944, or at December 31st, 1945, either by way of assets of liabilities for any of these companies, have you?

A. Correct.

Q. Now, I wonder, Mr. Brady, if you would be good enough to look at Exhibit 338, which is entitled, "Details of miscellaneous deposits."

A. Yes, I have it.

Q. Now, you have a certain total on this exhibit, haven't you, representing the total monies or things of value on deposit with people on behalf of or for the benefit of the defendant at December 31, 1944?

A. Yes, sir.

Q. And what is that figure? A. $26,000.

Q. Now, then, you carry that figure over to the total figure, carry the total figure over and insert it in Exhibit 339, do you not, which the ladies and gentlemen have before them? I will direct your attention to the seventh——

A. Yes, I am looking for my copy.

Q. Well, maybe the clerk can get you the orig-

(Testimony of Augustas V. Brady.)

inal. It is [2058] entitled, "Net worth at December 31, 1944, and 1945."

A. I have it here now. I have it, Mr. Sullivan.

Q. My question was, you find that figure of—I beg your pardon, it is the third item down.

A. $26,000, yes.

Q. So that this is merely a supporting detail, and you take the totals off of this, which is Exhibit 338, and you bring them down into 339, is that correct? A. That is right.

Q. Now, you told us that at the opening of the year 1945, that is, at December 31st, 1944, that figure was what? A. $26,000.

Q. And at the close of the year was what?

A. $22,000.

Q. Do you find, referring to the Exhibit 338, do you find—will you kindly read for me the last item? A. "Deposit, Mandarin Hotel"?

Q. Please.

A. "Deposit in Mandarin Theater," I should say, "$5,000."

Q. And do you find you have an entry there at December 31, 1945? A. Yes.

Q. What is that? A. $5,000.

Q. Now, those are both treated as assets by you, aren't they? [2059] A. That is correct.

Q. You have given as a reference to the testimony, the testimony of Mr. Hogan at pages 580 and 585? A. 579, 580 and 585.

Q. Yes. I will hand you the official transcript and ask you if you will be good enough to examine

(Testimony of Augustas V. Brady.)

it and tell us where you find that the defendant had an asset of $5,000 involved in a deposit of the Mandarin Theater at December 31, 1945.

A. Well, he discusses a $2,000 and a $3,000 deposit.

Q. That is 1944, Mr. Brady, isn't it?

A. Yes.

Q. Let's get on to 1945. I will direct your attention to page 587.

A. "So that the end of the balance in 1945 was $5,000 plus interest, I believe." Is that what you have reference to, Mr. Sullivan?

Q. Yes. Is that what you have reference to, Mr. Brady?

A. Yes, I think it is, Mr. Sullivan.

Q. Well, that is a liability, isn't it? Look at the testimony closely—— A. Well——

Q. That is not an asset, that was the balance of $5,000, was it, that——

A. (Interposing): Just a minute. I didn't refer to 587 in my mention here. Cash of $5,000 has been considered as a [2060] liability on our net worth statement.

Q. That is right, but you put another $5,000 here as an asset, so you wiped it out, didn't you?

A. No, I don't think that is the same item. I believe this has to do with the—I see a $5,000 here at the end of 1944, but right offhand I don't see it at the end of 1945.

Q. Let me ask you this question to shorten it,

(Testimony of Augustas V. Brady.)

then: If that second $5,000 is not an asset but is a liability, as you have shown it on Exhibit 339, then this schedule which is 338 is to that extent erroneous, is it not?

A. If it wasn't on there. If the deposit wasn't on there, yes, but without reading all over the transcript I wouldn't really want to say yes or no right now, Mr. Sullivan. But at the time we put it down there, I say I was instructed to put that in at the beginning and end of the year.

Q. Well, if the opportunity presents itself, Mr. Brady, you might take a look at the testimony. Now, I will direct your attention to a number of items that you have on some gambling here. Would you read those to me, please, beginning about two-thirds of the way down the balance sheet, Exhibit 339, beginning with the word "Watsonville."

A. "Watsonville, Bakersfield, Alviso, Yosemite Club, Hollywood Club, 3600 San Pablo, Emeryville and The Palms."

Q. All right. Now, you have opposite "Watsonville" the notation, "Gibbons, page 116." [2061]

A. Yes.

Q. What does that mean?

A. Have you got the transcript there?

Q. Yes, but I mean, what does the reference there mean?

A. It means that Mr. Gibbons testified that he drove the defendant down to the club in Watsonville.

(Testimony of Augustas V. Brady.)

Q. And what is "opposite Bakersfield"? "Gibbons, page 119." What does that mean?

A. Same thing, that he had gone down to a place there operated by the defendant.

Q. And does it mean the same thing all the rest of the way down, down to "The Palms"?

A. I believe so, with the exception of the Hollywood Club. I had Gibson there, but I believe Mr. Filice testified there was a Hollywood Club.

Q. Now, I will show you the transcript, and let's take these up and tell me if you find there—show me the testimony that you are relying upon when you say that—strike that.

The effect of this for balance sheet purposes, Mr. Brady, from your point of view in preparing this, is that there was a gambling club in operation at Watsonville at December 31, 1944, is that what that means? A. No, sir.

Q. Well, what does it mean?

A. It means there were operations in these properties stated [2062] during the period of time, but the amounts in investment we would not know, so we put nothing down for the investment.

Q. Well, then, the "X" here means——

A. It means the value had been undetermined.

Q. Oh. Well, then, that didn't enter into your balance sheet computation at all, did they?

A. No, sir.

Q. So that——

A. (Interposing): With the exception. Well, they might in this case, Mr. Sullivan, that they do

(Testimony of Augustas V. Brady.)

enter into it in that we have the next item, "Bank roll, cash for above clubs, $50,000." I was instructed to put that down as bank roll for operating these clubs.

Q. All right. So then, pursuant to instructions, or taking your entries that you have made as instructed, what that set of entries means is that there were a number of clubs in operation some time during 1945, but they had a bank roll of $50,000 at the beginning of the year and a bank roll of $50,000 at the end of the year, is that correct?

A. Yes.

Q. And do you take the position that that is based on the evidence in this case?

A. Yes, based on the evidence of Mr. Overstreet, who raided the place, got $43,000 and said there was over $9,000 left he did not pick up. [2063]

Q. Well, let's take Watsonville, page 116.

A. Yes?

Q. You can read to me the testimony there which you rely upon in inserting this as an operation.

A. "Directing your attention to Watsonville"—this is page 116—"Q. Directing your attention to Watsonville, I ask you if during the year 1945 you made any visit to Watsonville at the request of the defendant? A. Yes, I did.

"Q. What was your business in Watsonville?

"A. Well, I went down——"

Then you asked for a foundation:

(Testimony of Augustas V. Brady.)

"We ask that a foundation be laid, if your Honor please," and the Court said, "All right." Then Mr. Fleming said,

"Where did you go in Watsonville?

"A. That I don't know. The Hollywood Club on Main Street, that is all I know about it.

"Q. At whose direction?

"A. By his directions.

"Q. By 'his,' do you refer to Chin Lim Mow?

"A. Yes, sir.

"Q. What instructions did he give you with respect to your visit to Watsonville at the Hollywood Club?"

Then you said, "I ask that a foundation be laid, if your Honor please," and the Court said, "I think there is sufficient [2064] foundation laid. You may answer the question.

"Q. He sent me down there. I don't know. I would generally get a package of money—I don't know what it was. It was supposed to be money. I don't know whether it was or not. It was all wrapped up."

Then Mr. Fleming asked the question, "You would go down there and pick up a package?

"A. Yes, sir.

"Q. What would you do with the package after you got it? A. Bring it back to him."

That was the basis, Mr. Sullivan, and, according to that——

"By 'him,' you refer to Chin Lim Mow?

"A. Yes.

(Testimony of Augustas V. Brady.)

"Q. Did you make those trips in 1945 to this place in Watsonville?

"A. I believe there were a few trips made at that time. If it was open, I did."

That was the basis for using this [2065] reference.

Q. All right, in making this entry, did you consider Mr. Gibbons' testimony at page 135 of the transcript where, after talking about Watsonville, he was asked this question:

"You do not want to state positively that you went down there in the year 1945, do you?

"Answer: I won't state when I was there. I was there, yes, sir."

Did you consider that testimony at page 135 at all?

A. I got to go back to my question, Mr. Sullivan, I put these down at the instructions of Mr. Fleming. I didn't evaluate the evidence.

Q. I understand.

A. I believe it is up to the Jury, I put down what I was instructed to. This, I think, represents the Government's viewpoint of the case.

Q. Now, you have given as a reference here, "Bakersfield, page 119." I wonder if you would point out to us the evidence that you have as the basis for this entry in your balance sheet?

A. This is on page 119 (118):

"Directing your attention to Bakersfield, I ask you if you went to Bakersfield on business for Chin Lim Mow?

(Testimony of Augustas V. Brady.)

"Once I believe it was.

"When was that? [2066]

"That I couldn't say. It has been some time back. It might have been any time. I don't know exactly. I won't recall the year. Anyway I went down there once. I got a package there and I brought it back to him. They said it was money. I don't know. I didn't see it. It was wrapped up.

"Where did you deliver the package?

"To him.

"Chin Lim Mow?

"Yes, sir."

That is Bakersfield.

Q. Do you find any reference in the testimony to Bakersfield in the year 1945?

A. He said—1945 as such isn't mentioned right—wait a minute: "Was that in the year 1945," and then he said, "That I don't know. I don't remember. It might have been, it might not. Whether it was in 1945, I don't remember."

Q. Where are you reading from now?

(Witness indicating.)

Q. That is Alviso?

A. Excuse me. No, in Bakersfield I don't see 1945 mentioned in that.

Q. Let's take Alviso then as long as you are there.

A. "I direct your attention to Alviso, and ask you if you were ever sent to Alviso on business by the defendant? [2067]

"Yes, sir.

(Testimony of Augustas V. Brady.)

"Was that in the year 1945?

"That I don't know. I don't remember. It might have been, it might not. Whether it was in 1945 I don't remember.

"What business took you to Alviso?

"I believe I took a package or to get a package, I don't recall."

Q. Is that the testimony that you base that reference on? A. Yes.

Q. Now, I believe you said that you put in an entry of $50,000 for bank roll, cash for the above clubs. You see that there?

A. Yes, Mr. Sullivan.

Q. What clubs?

A. Well, the place at Watsonville, Bakersfield, Alviso, Yosemite Club, Hollywood Club, and 360 San Pablo, The Palms.

Q. Can you tell me, can you refer us to any exhibit or any page of the testimony that indicates a bank roll of $50,000 for all of those clubs you have just mentioned?

A. Except that Mr. Gibbons said he moved the money around from one place to another.

Q. The fifty thousand?

A. Well, he said he took money, and we know forty-three thousand was picked up by Mr. Overstreet.

Q. Let's see where you get the fifty thousand; first tell me [2068] that, please, where does this fifty thousand come that you have on that balance sheet, where does that come from?

(Testimony of Augustas V. Brady.)

A. $50,000 was an amount that Mr. Fleming told me to insert.

Q. Well, just throw it in?

A. Because—no, because the testimony of Mr. Overstreet.

Q. Well, then it is based upon the testimony of Inspector Overstreet? A. Yes, sir.

Q. Now, let's see Inspector Overstreet's testimony. I believe he gave us a figure of $42,259.40, didn't he? You recall that?

A. Yes, didn't he say there was some other money he didn't pick up?

Q. Yes, and that was $5,000 in coins that he didn't take; isn't that correct? A. Yes.

Q. Let's add that. That is $47,259.40, and this is what he got when he raided the Club, isn't that right? A. That's right.

Q. You recall his telling me that the name of the Club that he raided was the Wai Yuen Club?

A. I wasn't present when—I read the transcript —at the time I was not present when he was testifying.

Q. I am sorry to ask you a question which takes you at a [2069] disadvantage, I didn't mean to.

But I will ask you to look at 92, page 92, and tell me if Mr. Overstreet did not identify the Club that he raided as the Wai Yuen Club?

A. He mentions here The Palms. "And The Palms was only the name of the building, isn't that correct?

"That is correct."

(Testimony of Augustas V. Brady.)

Q. Go up a little further.

A. "Well, if I mentioned the name Wai Yuen to you——

"I believe that is the name of the Club, yes.

"And The Palms was only the name of the building, isn't that correct?

"That is correct."

Q. He said it used to be a saloon, didn't he?

A. And, "There had been a bar or saloon there for some years before that by the name of The Palms * * *

"That is correct."

Q. All right. So then Mr. Overstreet, and he is the man you have on your exhibit——

A. Yes.

Q. Mr. Overstreet raided the Wai Yuen Club located at a saloon called The Palms, and he picked up $47,259.40, including—he found $47,259.40 and picked it up all but $5,000? A. Yes.

Q. Is that correct? Are you basing your entry of fifty [2070] thousand on this incident of forty-seven thousand? A. Yes.

Q. All right. Now, can you call our attention to any testimony in this record connecting up this incident with Watsonville, Bakersfield, Alviso, Yosemite Club, Hollywood Club, 3600 Emeryville?

A. I think Mr. Gibbons mentioned he took packages down and brought some back.

Q. Took this forty-seven thousand?

A. He didn't say how much—didn't he say here he took money down and brought it back?

(Testimony of Augustas V. Brady.)

Q. Are you able to base, to connect this amount of money upon which you base your fifty thousand, are you able to connect that up with any of those former clubs whose names I read?

A. I was instructed to put $50,000 as an estimate of the amount to carry those clubs.

Q. All right. Now, were you similarly instructed to put it in at the end?

A. Yes, sir, so it had no effect on the income for the year.

Q. Except that do you recall the testimony of David Shew, do you not, that the Wai Yuen Club was closed for the last three months of 1945? Do you recall that testimony?

A. I think he said it could have been, wasn't open to his knowledge. [2071]

Q. Now, let's go back to your schedule, Mr. Brady, for 1944 and 1945. I believe that you have come down to totals of net worth at those two periods, have you not? A. Yes.

Q. And then you have subtracted one total of net worth from the other and in that way you arrive at either an increase or a decrease, and I will ask you in this case if you arrive at an increase?

A. An increase.

Q. So that that represents then an increase in net worth from December 31, 1944, to December 31, 1945, of $228,681.67, is that right?

A. Yes, that is right, Mr. Sullivan.

Q. Now, you have taken and made, without

(Testimony of Augustas V. Brady.)

going into detail, certain additions to net worth along the lines of the general formula explained to me and certain subtractions from net worth and arrived at a figure of $270,914.39?

A. That's correct.

Q. Now, I will ask you if included in this first figure which you have carried over from your balance sheets which the ladies and gentlemen have, if there is included in that figure items carried under the names of the various children and other people than the defendant and his wife?

A. Carried under their names?

Q. Yes. [2072] A. Yes, I believe so.

Q. Do you, when you come down to your reconcilement that we talked about, do you reconcile the income figure with the income reported by the defendant alone, or do you reconcile the income with the income reported by all the family on Exhibit 342?

A. We made a reconcilement with the income reported by Chin Lim Mow and his wife.

Q. All right. So that in your reconcilement then, which is Exhibit 342, you start with a figure which represents assets, or includes assets, carried under the name not only of the defendant but carried under the name of members of his family, is that right? A. That is right. [2073]

Q. And as a matter of fact even you include there assets carried under the names of strangers, like Howard Chang and Evelyn Lee Chang, is that right? A. That is right.

(Testimony of Augustas V. Brady.)

Q. You have included in there $100,000, for example, have you not, in the Howard Chang and Edmund Lee Chang trustee account?

A. At the beginning of the period.

Q. All right. Now, when you come down to reconciling your net taxable income figure you only reconcile it with the income that is reported by two of the people, not all of the group of assets, isn't that right?

A. Reported it to the—the person evidently who got the money.

Q. Are you basing that on the facts now——

Mr. Sullivan: I move to strike that answer, your Honor.

The Court: The motion is granted to strike.

The Witness: We made a reconcilement with the husband and wife, Mr. Sullivan.

Q. (By Mr. Sullivan): You did not reconcile it with the reported income of, for example, the members of the family, did you?

A. That's correct.

Q. Now, in one of your charts, Mr. Brady, you added back the taxes paid by the members of the family? [2074] A. Yes.

Q. And that was according to an exhibit which Mr. Fleming introduced here and in what sum of money was that, by the way?

A. Where I have tax paid for others?

Q. Yes. A. $27,239.09.

Q. Now, if your analysis of net worth includes

(Testimony of Augustus V. Brady.)

assets carried under the name not only of the defendant but of members of his family, and it was necessary to reconcile the taxable net income against the reported income of all the members of the family, then we would have to add that $27,-239.09 back in as a non-deductible expense, wouldn't we? If we were doing that? A. We did that.

Q. You did that in your second schedule, but not in the first schedule.

A. The first schedule, no.

Q. Now, if I add in——

Mr. Sullivan: I wonder, your Honor, if the ladies and gentlemen of the jury have 342 before them. May I ask that? It is entitled, "Understatement of income based on increase in net worth."

The Court: 340?

Mr. Sullivan: 342, your Honor.

The Court: I have it marked 340, "Understatement of income based on increase in net worth plus non-deductible [2075] expenditures and minus non-taxable income, 1942 to 1944, inclusive."

Mr. Sullivan: No, the other, your Honor, is the year 1945. It is Exhibit 342, I am sure.

The Court: You have it, ladies and gentlemen?

A Juror: Says 287 here.

Mr. Sullivan: On the photostat of the first trial, your Honor; it has been renumbered 342 by the Government.

Q. Mr. Brady——

The Witness: Here's a copy, your Honor.

The Court: Thank you.

(Testimony of Augustus V. Brady.)

Q. (By Mr. Sullivan): Mr. Brady, then referring to your Exhibit 342 you find there on the fourth line down, "plus non-deductible expenses." If we add in there the figure for family taxes, considering this on the family basis, if we added that in there it would in effect add $27,239.09 to this figure of $270,914.39, wouldn't it? A. Yes.

Q. It would adjust that figure by that much money? A. Yes.

Q. And the total of that, I think you have some place, is that—that is 298——

A. $298,153.45.

Q. Now, Mr. Brady, if it should appear by the evidence in this case that the $100,000 that you have charged to the [2076] defendant because of this Pacific National Bank account of Evelyn Lee Chang and Howard Chang should not be charged to him, we should take that out of the figure, shouldn't we? Out of your calculation?

A. You're asking me to deduct $100,000?

Q. Not yet, just saying if under the evidence—strike that.

You have put that in there at the direction of the prosecutor, haven't you? A. Yes, I have.

Q. If it should appear in this case under the evidence and it should appear that the $100,000 is not chargeable to the defendant and that the prosecutor's theory is wrong, then this should be eliminated from your calculation, shouldn't it?

A. Not all of it no, because at the end of the year there was some 40——

(Testimony of Augustus V. Brady.)

Q. $17,500?

A. No, it was more than that, Mr. Sullivan. At the end of the period I believe there was in those accounts——

Q. You are looking at the wrong account. I am talking about Howard Chang and Evelyn Lee Chang accounts. A. Oh.

Q. Pacific National Bank. You have charged in various places in your schedules and included in your calculation $100,000, haven't you?

A. I would like to get my schedule first so I can follow you, [2077] Mr. Sullivan.

Q. You go right ahead. Mr. Brady, pardon me——

A. I am looking for the detail of cash.

Q. Exhibit 345. I will ask you on the detail of cash if you don't charge the defendant with a balance in the account of $17,500 at December 31, 1944? See it? A. That is '45.

Q. I mean 1945. Pardon me. A. Yes.

Q. December 31, 1945.

A. Be nothing at the beginning, be nothing at the——

Q. It didn't open in the beginning.

A. Yes.

Q. You didn't give us anything, then. Now, you have charged him with $70,000 deposited in that account on January 3, 1946? A. That's right.

Q. And you have charged him with the real estate deposit of twelve five made somewhere around October 15, 1945? A. That's right.

(Testimony of Augustus V. Brady.)

Q. Is that $100,000? A. That's right.

Q. All right. Now, if it is found from the evidence in this case, or if it is found there is no evidence to support your contention that there was a $50,000 bank roll for seven clubs as you indicated on your Exhibit 338 at December 31, 1945, [2078] we would take that out, wouldn't we?

A. According to your assumption, yes.

Q. Well, you are presenting the Government theory, aren't you? A. Yes.

Q. Now, I am asking you to assume that the Government's theory is not supported by the evidence, Mr. Brady. You understand that I am not asking you to pass upon any facts. Now, I'll——

A. Mr. Sullivan, that last $50,000 didn't change the beginning and end of the year.

Q. Not talking about the beginning of the year, talking about the end of the year. A. O.K.

Q. Now, I will show you Exhibit 186 in evidence introduced by the Government and ask if you find some liabilities on that schedule at December 31, 1945? Would you kindly read them?

A. This is 40, Mr. Sullivan.

Q. Well, just have to keep going; I'm sorry I didn't open it for you.

Will you kindly read liabilities to the Wai Yuen partners and tell me if you don't find $48,000 worth of liabilities?

A. I have here a balance sheet marked Chin Lim Mow, doing business as Wai Yuen Club, Wai

(Testimony of Augustus V. Brady.)

Fung, and Wai Lee Company, balance December 31, 1945, liabilities—first, we have— [2079] can I read them to get this amount?

Q. No, just want you to add up for me the liabilities, the last five liabilities that you find there and tell me if the total is not $48,000?

A. Well, if you are going to use that balance sheet——

Q. Well, I am using it.

A. This balance sheet has cash of $220,000 and a net worth of $256,000, so if you consider those liabilities are in order, then this net worth of $256,000—is that what you mean?

Q. I just want you to add up those four items.

A. These four items (indicating)?

Q. Yes. And it is $48,000, isn't it?

A. Yes.

Q. If you add up the similar liabilities at December 31, 1944, you come to the sum of $32,000, will you not, referring you to 186 in evidence?

A. Yes.

Q. And the increase in the year 1945 is $16,000, is it not? A. That's right.

Q. Now, have you included in your balance sheet any place, Exhibits 337 to 345, provision for liability of $32,000 at December 31, 1944?

A. We did not——

Q. And liabilities in the sum of $48,000 at December 31, 1945? [2080]

A. We did not use this balance sheet, Mr. Sullivan.

(Testimony of Augustus V. Brady.)

Q. I am not asking you whether you used it or not, but my question is did you in any place include liabilities in those amounts that I have mentioned?

A. I have to look at the Wai Yuen balance sheet.

Q. You have a schedule of that, don't you?

A. I believe I do, Mr. Sullivan. We did not use those liabilities.

Q. Now, if we found that those—or if the theory of the Government that the liabilities did not exist was not supported by the evidence and there was evidence that they did exist, we would add the increase or $16,000 to my column there?

A. Well, if you are using that balance sheet why don't you use the cash on hand of $165,000?

Q. Now, Mr. Brady——

Mr. Fleming: The witness is entitled to explain his answer.

The Court: He is asking questions.

Q. (By Mr. Sullivan): Now, referring you to Exhibit 186, I will ask you if you find the liability at December 31, 1945, for withholding taxes payable in the amount of $5,219.80?

A. On this balance sheet, yes. [2081]

Q. And did you include it in your balance sheet? A. No.

Q. Now, I wonder if you would be good enough to give us the total of these four figures, $100,000, $50,000—here is the total I reached, and you can verify it. I have $176,219.80. Probably $171,219.80.

Now, if it should be found that your schedule is

(Testimony of Augustus V. Brady.)

not accurate with respect to Mr. Hogan's liability, you're carrying it as an asset, that would increase that to $176,219.80?

A. Well, if you want to use those computations, why, your figures there are correct.

Q. All right. Now, you arrived, we arrived here at a total of $298,153.48 representing the taxable net income of assets, from assets, and based upon assets carried in the name of defendant, members of his family, into which we had added the family taxes paid, you recall that? A. Yes.

Q. We will subtract these adjustments of $176,-219.80, and I find that I arrive at a figure of $121,-933.68, is that correct?

A. No, I wouldn't say it is correct, Mr. Sullivan.

Q. Is it a correct calculation?

A. If you are taking this $50,000 as a deduction, that didn't change during the year, we are taking this $270,000 as the increase during the year. You are taking $270,000 as the income, and there is $50,-000 there. [2082]

Q. I am asking you to assume that $50,000—you are talking about the gambling club fifty thousand?

A. At the beginning and at the end of the period.

Q. I am eliminating it from the end only upon the assumption that the club was closed.

A. You're assuming it had fifty thousand at the beginning period.

Q. I am not eliminating this figure of fifty

(Testimony of Augustus V. Brady.)

thousand because you have it in your balance sheet, you understand that. You have this fifty thousand dollars at the end——

A. You have it at the beginning and end.

Q. You have it at the end, don't you?

A. Yes.

Q. All right, I am asking you to assume an elimination at the end.

A. If you want to make that assumption, yes.

Q. All right, I arrive then at this adjusted figure of $121,933.68. You find the calculation there?

A. That calculation is correct as you have it there, yes.

Q. Will you kindly tell me—I would like to reconcile that figure against the income reported by Mr. Chan and his family. Will you kindly tell me how much money Mr. Chan reported in 1945?

A. I have just Chan and his wife.

Q. All right. [2083]

A. Of $54,341.66, but I don't have right here the amount reported——

Q. Now—— A. ——by the children.

Q. Mr. and Mrs. Chan we have——

A. $54,341.66.

Mr. Sullivan: May I have this exhibit marked for identification, Defendant's Exhibit next?

The Court: Let it be marked. How long are you going to be with Mr. Brady?

Mr. Sullivan: Just about to finish, your Honor.

The Court: I was just about to suggest, without

(Testimony of Augustus V. Brady.)

criticism of you, you had just about exsanguinated him.

The Court: DC-2.

Mr. Sullivan: I hope that your Honor is not taking that literally.

The Court: No, I prefaced my remark by saying, not saying it in criticism of you.

Q. (By Mr. Sullivan): I will show you Defendant's Exhibit DC-2—is that what it is, Mr. Clerk?

The Clerk: Yes.

Q. (By Mr. Sullivan, continuing): And ask you if you are familiar with that exhibit as a calculation from the tax returns in evidence made during the last trial of the amounts of reported income, income reported on the tax returns of the [2084] family?

A. I don't think I recall seeing this, Mr. Sullivan.

The Court: Speak up, Mr. Brady.

The Witness: I don't think I recall seeing this. This is—oh, this is a total——

Q. (By Mr. Sullivan): Total reported income.

A. Yes.

Q. From the tax returns in evidence. Does that refresh your memory as to the amount of total income reported by the family? A. Yes.

Q. And what is that figure which is there?

A. $75,449.57.

Q. Seventy-nine thousand what?

(Testimony of Augustus V. Brady.)

A. Four forty-nine fifty-seven.

Q. If I add the total reported income of Mr. Chan and family, what figure do I get, please?

I have the figure here of $129,791.22. Do you find that to be a correct addition?

A. It looks correct.

Q. Now, if I reconcile——

The Court: Just a minute. One of the jurors is questioning your calculations.

A Juror: 123.

Mr. Sullivan: It should be 30 right here (indicating).

A Juror: A hundred and twenty-three [2085] thousand.

Mr. Sullivan: This was a three——

A Juror: A hundred and twenty-three thousand.

Mr. Sullivan: $123,791.23.

Your Honor, pardon me a moment?

Mr. Hubner points out it should be one thirty-three, is that correct?

The Witness: A hundred and thirty-three thousand.

Mr. Sullivan: I will start over again.

Mr. Fleming: Mr. Sullivan, you have the figure 75,000 at the last trial, 449.

The Witness: Seventy-five thousand.

Q. (By Mr. Sullivan): All right, let me start over again, Mr. Brady, please.

A. Seventy-five thousand——

The Court: Got a courtroom full of accountants here, and can't even add a simple set of figures.

(Testimony of Augustus V. Brady.)

Q. (By Mr. Sullivan): Give me Mr. and Mrs. Chan's reported income again, please.

A. $54,341.66.

Q. Give me the family's. A. $75,449.57.

Q. Now, how many cents?

A. Fifty-seven cents.

Q. What total do you get, before we announce it publicly? A. $129,791.23. [2086]

Q. All right. Mr. Brady, assuming that the taxable net income on the net worth basis should be found to be the figure that I have calculated here upon the assumptions that I gave you, the net worth basis included assets carried in the name not only of the defendant but also his family and containing additions of non-deductible expenses representing taxes paid not only by him but by—for his family, do you find that this figure which I have of $121,933.68 reconciles with reported income? A. No, it is less.

Q. I beg your pardon?

A. I say that figure there is less.

Q. Is less. Now, if it is less, does that indicate an underpayment, an underreporting or of an overreporting of income based upon these facts and these schedules?

A. Based upon your assumption, then it would appear that there was an overreporting.

Mr. Sullivan: No further questions.

The Court: I think we will take the adjournment now.

Going to adjourn now, ladies and gentlemen,

(Testimony of Augustus V. Brady.)

until tomorrow morning at 9:30. I again admonish you, as I am required to do by law, not to discuss the case among yourselves or with others, nor are you to form or express any opinion concerning the case until the matter is finally submitted to [2087] you.

Tomorrow morning at half past nine.

(Thereupon an adjournment was taken to the hour of 9:30 o'clock a.m., tomorrow, Friday, October 10, 1952.) [2087-A]

October 10, 1952, at 9:30 A.M.

The Clerk: United States of America vs. Chin Lim Mow, on trial.

Mr. Fleming: Ready, your Honor.

Mr. Sullivan: Ready, your Honor.

The Court: You may proceed.

AUGUSTUS V. BRADY

was recalled as a witness for the Government, previously sworn.

Redirect Examination

By Mr. Fleming:

Q. Mr. Brady, yesterday afternoon you were asked a question with respect to an accountant's viewpoint as to obtaining a starting point as clear and accurate as possible in making computations of increase of net worth, do you remember that?

A. Yes, I do.

(Testimony of Augustus V. Brady.)

Q. Now, from an accounting viewpoint, do you find a sworn statement under oath of the man whose taxes are being computed to be the best possible starting point?

Mr. Sullivan: I object to that, if your Honor please, calling for a conclusion and opinion of the witness, invading the province of the Jury.

The Court: Objection will be overruled.

A. Yes, I did. [2088]

Q. (By Mr. Fleming): Now, if that statement is false, and again referring you to an accountant's point of view, do you adjust that starting point as you discover items which have been omitted from it? A. Yes, sir.

Q. In making the computations which you have made, is it the Government's theory that the Government has been able to uncover all the assets and liabilities of the defendant, Chin Lim Mow?

Mr. Sullivan: I object to the question, if your Honor please, calling for a conclusion and opinion of the witness. Calls for an answer which is stated in the usual course of a criminal proceeding by counsel for the party, not by the witness, as to what the theory is.

The Court: Objection will be overruled.

A. May I have that question again, please?

The Court: Read the question, Mr. Reporter.

(Question read by the Reporter.)

A. We attempt to uncover all the liabilities and

(Testimony of Augustus V. Brady.)

all the assets in arriving at as nearly correct a net worth at any particular date as possible.

Q. (By Mr. Fleming): Do you mean by that that you make the best available attempt?

A. Yes, sir.

Q. Now, I will direct your attention to Exhibit CQ, the [2089] Defendant's exhibit identified by the witness, Wallace, of taxes paid out of the John J. Allen, Jr., trustee account, and direct your attention to the item under the heading, "Newspaper." I will ask you whether you recall the testimony of the witness, Wallace, that that relates to premises of 809 Sacramento Street?

A. I think I have a recollection of that, yes, sir.

Q. And do you further recall Mr. Wallace's statement that those may or may not be payments for a mortgage on that place—on that property?

A. Yes, I think he did mention that.

Mr. Sullivan: I object to that, if your Honor please—pardon me, Mr. Brady. That is not my recollection of the testimony. If counsel will refer to the testimony of Mr. Wallace, refer that testimony to me, that is not my recollection of the testimony.

The Court: The objection will be overruled. The Jury will regard the testimony and will remember it and have it in mind.

Mr. Fleming: Will you read that last question and answer, please, Mr. Reporter?

(Question and answer read by the Reporter.)

(Testimony of Augustus V. Brady.)

Q. (By Mr. Fleming): Did you include that in the assets of the defendant, Chin Lim Mow?

A. No, I don't believe we did. [2090]

Q. Why not?

A. Well, we didn't have any knowledge of it at the time this statement was being prepared.

Q. Similarly, with respect to the questions asked you by Mr. Sullivan with respect to a company known as American Four Company and Hing Wah Tai, did you include those in your list of assets of the defendant, Chin Lim Mow, as of 1945?

A. No, sir, we did not.

Q. Why not?

Mr. Sullivan: Well, I will object to that question as to why not, if the Court please, on the ground that the testimony here elicited from the witness by Mr. Fleming at the outset, if I remember correctly, was that Mr. Brady did not personally investigate this case at all.

Mr. Fleming: That is correct, your Honor. But the witness was asked yesterday whether or not he had included certain assets, and he replied no; and I am developing that answer which was developed on cross-examination.

Mr. Sullivan: That is precisely my point. I merely asked if the assets were in his schedule or not. As your Honor will remember, there was some colloquy between us on that exact point and your Honor permitted me to ask that question, so all the witness did was consult the schedule to see whether any asset was there, but as to why or why not that

(Testimony of Augustus V. Brady.)

asset wasn't included or was included, this witness can't [2091] testify because he has already said he didn't personally investigate this case.

The Court: I will overrule the objection.

A. It wasn't entered. I believe you and I talked about it in preparing the statement, but we had no definite knowledge of the amount of his investment so it was left out.

Q. (By Mr. Fleming): And is your answer the same with respect to the Lucky Company, America Company and Tai Lowe, Fook Chin, as to why you did not include those?

A. We had no definite knowledge as to what his investment was, so it was left out.

Q. As a matter of fact, in your tabulation, other than the bank rolls and the fixtures of the Wai Yuen Club, you didn't show the value of assets of any of these gambling clubs, did you?

Mr. Sullivan: I object to the question as leading and suggestive.

The Court: Objection will be overruled.

A. No, we did not.

Q. (By Mr. Fleming): You put down in your tabulation what?

A. We put down an "X," which would indicate, "Amount unknown," and rather than put an estimate, we left that blank, just as we did with personal living expenses. We had no definite knowledge as to the exact amount of his living expenses, and therefore we put down an "X" indicating "amount unknown." [2092]

(Testimony of Augustus V. Brady.)

Q. And in adding and subtracting of figures, then, you treated those "X's" as zeros, did you not?

A. Yes.

Q. Now, you recall yesterday that counsel for the defense then took your figures which you had computed of the defendant's income for the year 1945, and to that made certain calculations on the board? A. Yes, I recall that.

Q. Do you know to what I am referring?

A. Yes.

Q. That figure, I believe, was for the year 1945, defendant's income was how much?

A. $270,914.39, as shown on Exhibit 342, which was put in evidence.

Q. Defendant's net income?

A. That is, defendant and his wife, Mr. Fleming.

Q. That is the figure which you gave Mr. Sullivan from the calculations? A. Yes.

Q. Then do you recall his tabulating certain items and reaching the figure of $176,219.80, referring to the figures still on the blackboard?

A. Yes, I see the figure there, but I was trying to reason out how he arrived at that one.

Q. Well, we will go through this. [2093]

A. Yes?

Q. You recall his adding up these items and asking you to subtract that, the net income figure to which had been added——

A. (Interposing): Here is one hundred seventy-six here (indicating on blackboard).

(Testimony of Augustus V. Brady.)

Q. You were asked by Mr. Sullivan to subtract that? A. Yes.

Q. And in arriving at that figure, he first gave you the figure of $100,000 to subtract, did he not?

A. That is correct.

Q. I will write these in a different colored ink. And that was the property which we have identified as having gone through the Pacific National Bank, Evelyn Lee Chang, trustee, is it not?

A. That was the $70,000 deposited on January 3rd, 1946, in the Pacific National Bank of $70,000, and the balance in the Howard and Evelyn Lee Chang trustee account at the end of 1945 of $17,-500, and deposit of $12,500 through Mr. Ogilvie, making up the $100,000.

Q. Now, in making that subtraction you were asked to assume that the figure was not supported by the evidence, do you recall that?

A. Yes, I have a recollection of that.

Q. Now, I will direct your attention to a check for $12,500, signed "Evelyn Lee Chang," Government's Exhibit 240; a check for $2,000, Government's Exhibit 243; a check for $84,000, [2094] Government's Exhibit 235; the bank statement on the Pacific National Bank, Government's Exhibit 239; and ask you if these items all relate to that figure of $100,000? A. I believe they do.

Q. And I will direct your attention to an entry in the books of the Gerdon Land Company——

A. (Interposing): Oh, I might add to that, Mr.

(Testimony of Augustus V. Brady.)

Fleming, I did not investigate this case, but from the record of the testimony I believe that was brought out. That is, my knowledge would be limited to that.

Q. To the testimony?

A. I did not have anything to do with the investigation of this amount, but from the recollection of the testimony that this all had to do with the deposit, because——

Q. Well, I have a——

Mr. Sullivan: Pardon me, Mr. Brady. If your Honor please, I would like to call something to your attention. Mr. Fleming asked this gentleman if this is not supported in the evidence. That is not the question I asked Mr. Brady yesterday. The question I asked him yesterday was if it should appear under the evidence that the $100,000 is not chargeable, and that the prosecutor's theory is wrong. That was my question to him.

The Court: You were asking him to assume that.

Mr. Sullivan: Yes, your Honor. Not whether there was [2095] any tangible document in evidence. We all know that these checks are in evidence. My question was directed to this: Mr. Brady said he had put these things in his balance sheet because the prosecutor told him to, and I asked him this question at page 2077.

I didn't ask him if there was any evidence in the record. I pointed that out. I asked him if the prosecutor's theory was wrong. I would like to correct the question. That is the question I asked him.

(Testimony of Augustus V. Brady.)

The Court: Very well, the record will show that.

Q. (By Mr. Fleming): Mr. Brady, I show you Government's Exhibit 56, ledger of Gerdon Land Company, account number 37, which is a credit to the account of B. H. Chan, $70,000, and ask you if that credit relates to this account of $100,000?

A. Well, if——

Mr. Sullivan (Interposing): Just a minute, if your Honor please, I object to that question. I object to that question as calling for a conclusion and opinion of the witness, and deliberately invading the province of the Jury. That is the very point in this case that the ladies and gentlemen have to decide, if your Honor please.

The Court: I am inclined to agree with you. Objection sustained.

Q. (By Mr. Fleming): To what property does that credit of $70,000 relate? Give me the address, please. [2096]

Mr. Sullivan: I respectfully say to your Honor all Mr. Brady is doing is reading what he sees in that book.

The Court: That is what he is asked to do.

A. That is all I am going to do.

Mr. Sullivan: This question is a little bit different.

The Court: The last question wasn't. That is what he is going to do.

A. This sheet, Account 37, it is, "Wurley Wong, C. C. Chan," and that is scratched out and "B. C.

(Testimony of Augustus V. Brady.)

Chan'' is inserted. And on 5000 Broadway there is——

Q. (By Mr. Fleming): Well, that is the question. The question was to what address does that account relate? A. 5000 Broadway.

Q. To what address does this $12,500, the check which you identified before and which was the source of testimony by Norman Ogilvie, to what address does this relate? A. 5000 Broadway.

Q. Is that the same property? A. Yes.

Q. Let's go to the next item which you were asked to subtract. I believe that was an item of $50,000, and in referring to that item you were asked to assume—you were asked:

"Question: Now, if it is found from the evidence in this case, or if it is found there is no evidence to support your contention that there was a $50,000 [2097] bank roll for seven clubs as you indicated on your Exhibit 338 at December 31, 1945, we would take that out, wouldn't we?

"Answer: According to your assumption, yes."

And you were further asked:

"Now, I am asking you to assume that the Government's theory is not supported by the evidence."

Mr. Sullivan: Well, I ask that counsel read the intervening question, too. It is misleading if he leaves that out.

Mr. Fleming: Well, if your Honor please, I am entitled to examine this witness.

The Court: He is entitled to read such portions of the testimony as he chooses, and if you wish to

(Testimony of Augustus V. Brady.)

make any amendments or corrections, you may read such portions as you choose.

Mr. Sullivan: Your Honor please, I made the statement because counsel made that against me the other day.

The Court: All right, let's not get into any colloquy.

Q. (By Mr. Fleming): You recall being further asked to assume the Government's theory is not supported by the evidence? Do you recall that question yesterday with respect to this item of $50,000? A. Yes, I recall that.

Q. Will you tell us again what that item of $50,000 represents in your tabulation, I believe it is 342?

A. That would represent the bank roll used to operate the [2098] various gambling places.

Q. What figure did you put in at the beginning of the year? A. $50,000.

Q. What figure did you put in at the end of the year? A. $50,000.

Q. Does that figure affect in any way this figure of $270,000 which you have calculated as net income for 1945?

A. No, it doesn't, because I used the same figure at the beginning and end of the period.

Q. Under Mr. Sullivan's assumption you were asked to subtract that figure at the end of the year but leave it in at the beginning of the year?

A. Yes.

(Testimony of Augustus V. Brady.)

Q. Now, do you recall any evidence indicating the defendant was still in the gambling business in 1946?

A. I think that will be shown in the 1946 return, Mr. Fleming.

Q. I show you Exhibit 9, 1946 tax return of the defendant, Chin Lim Mow, and ask you if you find that during that year he reported income from the Wai Yuen Club?

A. Yes, I find there is some income from the Wai Yuen Club in 1946.

Q. How much?

A. Reported $30,447.83.

Q. Do you recall any evidence indicating the defendant was still in the gambling business [2099] in 1947?

A. I think the 1947 return will show that, Mr. Fleming.

Q. I will show you Exhibit 10, 1947 tax return of Chin Lim Mow, and ask you if you find income reported from the Wai Yuen Company during that year?

A. Yes, the 1947 tax return discloses income in the Wai Yuen Club, Toe Yen, Wai Fong and Wai Lee Company, $25,549.54.

Q. You were asked certain questions with respect to the amount of $50,000, do you recall?

A. Yes, sir.

Q. Do you recall those questions?

A. Yes, sir.

Q. Do you recall, also, that some $42,000 was

(Testimony of Augustus V. Brady.)

picked up by Overstreet in the raid on February 4th, 1945, and not returned until February 14, 1945? A. Yes, I have a recollection of that.

Q. That was a raid on The Palms?

A. I believe I recall that. I think I read that. I wasn't present when Mr. Overstreet testified, but I believe it is in the record.

Q. I show you 184, the book identified by David Shew as the Wai Yuen Club's, and ask you if you find, according to that record, that the club was operated from the period February 6th to February 14, 1945?

Mr. Sullivan: I object to that, if your Honor please, as calling for a conclusion and opinion of the witness, because [2100] the witness, David Shew, testified that these cash books represented the gross receipts not only of the Wai Yuen Club but of the Wai Fong and Wai Lee lotteries.

The Court: Objection will be overruled.

A. Just reading this record of cash receipts for the month of February, I find under the date of February 6th a gain of $1,567.20.

Q. (By Mr. Fleming): My question related to February 6th to 14. A. Excuse me.

Q. Do you find, according to the books, the figure indicating operation on each of those days?

A. Yes, sir, I do.

Mr. Sullivan: Well, if your Honor please, may I have—I object to the question as unintelligible, because the books refer to three operations and

(Testimony of Augustus V. Brady.)

counsel is referring to an operation, obviously of the Wai Yuen Club. He is asking about the operation of the Wai Yuen Club, and the books have already been identified by Mr. Shew as representing in the cash book the operation of three clubs and a consolidated entry.

Mr. Fleming: I submit the objection is argumentative in nature, going to the weight of the testimony and not the propriety of asking it.

Mr. Sullivan: It goes right to the admissibility. If [2101] I have a composite figure on which are the Standard Oil, Union Oil and Shell Oil and try to reach a balance only as to the operation of Shell, I can't look to the composite figure because it might represent the Standard Oil as well.

Mr. Fleming: Mr. Sullivan took the same figures to prove the club was closed during 1943 through 1945. I can take the same figures then, to prove it was open during February 6th to 14th.

Mr. Sullivan: I did not take the same figures to prove it was closed. I took the testimony of Mr. Shew, and as corroborative of his testimony.

The Court: If you are going to show the club was opened——

Mr. Fleming (Interposing): My purpose is to show according to the books the club was open at that time, and I believe the figure itself will indicate.

The Court: Objection will be overruled.

A. Record of cash receipts for the month of

(Testimony of Augustus V. Brady.)

February shows an income and expenses for the February 6th through 14th, inclusive.

Q. (By Mr. Fleming): During that period $42,000 was down at the City Hall, was it not, according to the testimony of Inspector Overstreet?

A. That is my recollection, yes. I believe it was returned to him, according to Mr. Overstreet's testimony, of the 14th.

Q. Now, have you assumed, then, that there was as part of [2102] the bank roll at least another $8,000 with which the club could operate during this period of time?

Mr. Sullivan: I object to that, as to what the witness assumes in his calculation, being an assumption apparently based on other evidence; beyond the issues of this case, and incompetent evidence.

The Court: The objection will be overruled. This man is qualified as an expert. You have indulged in assumptions throughout the entirety of your cross-examination, and I will indulge in the same privilege.

A. Yes. You discussed this with me when we compiled this net worth statement, and you said that $50,000 would represent the reasonable amount of bank roll to operate the operation.

Mr. Sullivan: I move to strike what counsel told the witness as hearsay.

The Court: Motion is denied.

A. That is why we put the $50,000 in, your Honor.

(Testimony of Augustus V. Brady.)

Q. (By Mr. Fleming): The third item which you were asked to subtract were certain figures from Exhibit 186, balance sheet, Wai Yuen Club, or Chin Lim Mow, doing business as Wai Yuen, Wai Fong and Wai Lee Companies, as of December 31, 1945; and do you recall that you were asked to subtract some $16,000 increase in Wai Yuen liabilities to Chan Bat and others, and some $5,219.80 of taxes payable?

A. That is right. [2103]

Q. Now, is it the Government's theory, and have you followed that theory in preparing your chart, that those liabilities are fictitious?

Mr. Sullivan: I object to the question as incompetent evidence, calling for a conclusion and opinion of the witness.

The Court: Objection will be overruled.

A. Yes, sir.

Q. (By Mr. Fleming): And is it further the Government's theory that Exhibit 186, balance sheet, is completely unreliable?

Mr. Sullivan: Same objection, if your Honor please. The Government is bound by the evidence they introduce.

The Court: Same ruling. The Government is entitled to have its theory of the case expounded.

A. Yes, sir.

Q. (By Mr. Fleming): How about—well, look at the balance sheet from which Mr. Sullivan asked you to take these figures, and I will ask you if you find a certain figure of cash on hand?

(Testimony of Augustus V. Brady.)

A. Yes, I do.

Q. And how much is that figure?

A. "Cash on hand and in bank, $220,407.24."

Q. Two hundred twenty thousand——

A. Four hundred seven twenty-four.

Q. Now, in making your computations of net worth, how much [2104] of that figure of $220,000 odd dollars did you include as chargeable against defendant? A. $1,133.90.

Q. Was this figure of one thousand a figure you carried over into the chart which you identified?

A. Yes, I have. It is part of the investment in the Wai Yuen Club.

Q. And the difference between those two figures is how much? A. $219,273.34.

Q. And if you add that figure to the figure which you arrive—what figure did you arrive at of the net worth of the defendant as of December 31st, 1945? A. $1,115,155.04.

Q. If you add that figure of $219,273.34, what total do you get? A. $1,334.428.38.

Q. And, of course, if you added those, it would subtract from the $21,000 of liabilities which you previously discussed with Mr. Sullivan?

A. I didn't get that.

Q. Well, will you subtract the $16,000 and $5,000 from that figure? Will you do that? $5,219.80——

A. Oh.

Q. Will you subtract that figure?

A. Yes. I have $1,308,208.58. [2105]

Q. So that by accepting the figures in that ex-

(Testimony of Augustus V. Brady.)

hibit you would have a net worth of some $200,000 in excess of the net worth which you actually charged the defendant with, would you not?

A. Well, instead of just taking $16,000, which would be an increase of the liabilities, Mr. Fleming, you should take the full liabilities as shown here, which is some $38,000 instead of that $16,000.

Q. Well——

A. Taken at the end of the year.

Q. What would your answer be, then, Mr. Brady? $150,000 increase, roughly?

A. Oh, from this—yes, approximately.

Q. You were also asked with respect to a third item of $5,000 deposits on hand with Mr. Hogan, do you recall that? A. Yes.

Q. I believe you testified you referred to a deposit item in connection with the Mandarin Theater as of December 31st, 1944?

A. Yes, I believe I did.

Q. Did you find that—that referred to a one-eighth interest in the Mandarin Theater, did it?

A. Yes.

Q. Did you find that the one-eighth interest in the Mandarin Theater was ever entered in the Gerdon books during the year [2106] 1945?

A. Well, I didn't make an inspection of the Gerdon books, but according to your instructions I put it in as a deposit in 1944 on this schedule of miscellaneous deposits.

Q. And did you then put in the one-eighth in-

(Testimony of Augustus V. Brady.)

terest in the Mandarin Theater of $10,500 at the end of 1944 and end of 1945?

A. Yes, sir, I did.

Q. Did you also include at the end of 1945 $5,000, Hogan and Vest loan? A. Yes.

Q. Was that an error? A. Yes.

Q. So that to that extent your computations are in error? A. Yes.

Q. You said you included nothing for living expenses? A. That is right.

Q. If we include $5,000 of living expenses during the year 1945, would that make a computation the same as the one you have previously given us?

A. I would say yes.

Q. You were then asked to subtract one hundred seventy-six thousand and some odd dollars, and reached a mathematical figure of $121,933.68, do you recall that? A. Yes.

Q. And you were then asked, I believe, to add up or calculate [2107] the income reported by the various members of the Chin family, do you recall that? A. Yes.

Q. And I believe you said that roughly some $54,000 had been reported by Chin and his wife, and some $75,000 by the other members of the family? A. That is correct.

Q. Well, now, is it the Government's theory that a large part of the fraud consisted of having Chin's income reported by the members of the family in order to put his income in the lower tax bracket, as illustrated by your chart on the board?

(Testimony of Augustus V. Brady.)

Mr. Sullivan: I object to the question, if your Honor please, calling for a conclusion and opinion of the witness; asking the witness to pass upon not only the figure, but also upon the elements of the offense; asking the witness to give his opinion upon the subject of fraud, invading the province of the Jury.

The Court: Objection will be overruled.

A. Yes, sir, that is your theory. That is the Government's theory.

Q. (By Mr. Fleming): And if its views are correct, the result produced the tax discrepancy which is illustrated in that chart on the board, does it? A. I would say yes. [2108]

Mr. Fleming: No further questions.

Mr. Sullivan: I have just one or two questions, Mr. Brady, please.

Recross-Examination

By Mr. Sullivan:

Q. Let's get this thing straight about Mr. Hogan and the Mandarin Theater, and I will please have you refer to Exhibit 339. Do you find that on Exhibit 339, when you first came to court yesterday you submitted it in a form which gave a liability in the last entry at December 31, 1945?

A. That is correct.

Q. Now, that liability is how much, please?

A. $5,000.

Q. And that $5,000 was entered, was it, upon

(Testimony of Augustus V. Brady.)

the basis of testimony of Mr. Hogan that he lent $9,000 by putting in a promissory note for $9,000 to the title company, which represented $7500 of his own money and $1500 commission, do you remember that?

Mr. Fleming: Well, I don't believe there is any such testimony. I think the testimony was $5,000 was on deposit at the end of 1944.

Mr. Sullivan: Counsel, I am not talking about that. I object to that interruption. I am not talking about 1944.

The Court: There is no objection pending. Continue your questioning.

Mr. Fleming: May I have the last question read? [2109]

The Court: Read the question, Mr. Reporter.

(Question read by the Reporter.)

A. I believe this $5,000 was entered here on the testimony of Mr. Hogan that there was $5,000 due him at the end of 1945.

Q. (By Mr. Sullivan): That is right. The first part of that question, there was money due and the amount was $9,000, do you recall that?

A. I recall some testimony.

Q. Do you recall the testimony that he had received $4,000 in cash during the year 1945 and applied to the liquidation of the obligation which was secured by his note, $500 a month, so that some $4,000 was paid off against the nine?

A. $4,000 was put in the safe deposit box.

(Testimony of Augustus V. Brady.)

Q. Yes. A. Yes, I recall that.

Q. That left a balance due at the end of 1945 of $5,000? A. That is right.

Q. I will ask you to give me a page reference that you stated? A. I had 587.

Q. Isn't the exact page number 586? You might start with 587, the transaction we are talking about, is that what you had in mind?

A. I think we have conceded the $5,000 was in error. I mentioned that. [2110]

Q. You mean this liability is an error?

A. This deposit of $5,000 was an error. We are conceding that.

Q. Then I have your schedule wrong. You are going to take it off Exhibit 338?

A. Yes, take it off a deposit, but leave it on as a liability on 339.

Q. All right.

A. The deposit should be $25,000 less.

Q. So that Schedule 338 should reflect the deposit was an error?

A. Had an error of $5,000, yes.

Q. Now, just one question further, Mr. Brady: Will you give us this calculation which you made for Mr. Fleming of the cash on hand as a calculation made—withdraw that.

Is it your professional opinion that what you just did for Mr. Fleming by adding back the cash on hand according to Exhibit 186 is in accordance with the testimony of this case and accepted principles of accountancy?

(Testimony of Augustus V. Brady.)

A. I would say it would be the same theory that you submitted to me in various factors as to exhibits.

Q. I am asking you this: Is it your professional opinion what you just did for Mr. Fleming, adding back the cash on hand, is in accordance with settled principles of accountancy?

A. Assuming these facts to be true, yes. [2111]

Q. Well, have you in mind the evidence in this case where David Shew said that the figure cash on hand was used wasn't actual but theoretical? Do you recall that?

A. You asked me if this was a——

Q. I am asking you if you have in mind the testimony of David Shew that that figure which he put there is not an actual figure but a theoretical figure? A. Yes, I think so.

Q. Do you recall the testimony that David Shew said he had made no allowance for the drawings of the beneficial owners of the club, or beneficial owner, all through those four years, but merely allowed the cash to accumulate?

A. Yes, and that is why we did not use this figure in our computation, Mr. Sullivan.

Q. And do you recall that the whole statement starts with a little note down here, asterisks, in 1942? Do you see the asterisk opposite the "Cash on hand" figure? Will you be good enough to read it?

A. "December 31, 1943, cash on hand and in

(Testimony of Augustus V. Brady.)

bank, $42,347," with a notation down below, "Book balance. Actual cash on hand unknown."

Mr. Sullivan: No further questions.

Mr. Fleming: No questions, your Honor.

The Court: You may be excused, Mr. Brady.

(Witness excused.) [2112]

Mr. Fleming: May it please the Court, at this time there are some exhibits which I think your Honor has already admitted into evidence but which the record may not so reflect, and I will ask that the following exhibits be admitted into evidence:

157, for identification, being a net worth statement of Wai Yuen Club, September, 1942, submitted by David Chin.

Exhibit 263——

Mr. Sullivan: I wonder if we could take them up seriatim, if your Honor please? It might make it difficult for me to enter objections, this way. Would your Honor have any objection to that?

The Court: I have no objection.

Mr. Sullivan: With respect to the offer of Exhibit 157, I object upon the ground that it is incompetent, irrelevant and immaterial; a balance sheet at a date not tied up with the case, namely, September 30, 1942.

The Court: Objection will be overruled. It will be received in evidence.

The Clerk: Government's Exhibit 157 received in evidence.

(Thereupon the document previously marked U. S. Exhibit No. 157 for identification was received in evidence.)

Mr. Fleming: The next exhibit is 263, schedule of interest omitted from the 20 bank accounts, produced by the witness Farley. [2113]

The Court: Any objection?

Mr. Sullivan: No objection entered on that.

The Court: It will be received.

The Clerk: Government's Exhibit 263 in evidence.

(Thereupon the document identified above was received in evidence and marked U. S. Exhibit No. 263.)

Mr. Fleming: I will next refer to Exhibit 292, schedule letters written by Mr. Farley.

Mr. Sullivan: I know that has been admitted. They are admitted at page 1710, my record so reflects.

The Court: Very well.

Mr. Fleming: 293 and 294, which I am sure are also in evidence.

Mr. Sullivan: I don't find them in evidence, and I would like to interpose an objection on the same ground I did to 263, namely the documents are hearsay as to the defendant.

The Court: Objection overruled. They will be received in evidence.

The Clerk: Government's Exhibits 293 and 294 admitted into evidence.

(Thereupon documents referred to above were received in evidence and marked U. S. Exhibits Nos. 293 and 294 respectively.)

Mr. Fleming: Exhibit 306 and Exhibit 307, 306 being signature cards, Wai Lee Company; and 307 being a transcript [2114] of the bank accounts, I believe.

Mr. Sullivan: I object to the offer of 306, which pertains to other years, or other than 1945, as being irrelevant and immaterial, not within the issues of the case.

The Court: Objection will be overruled. They will be received in evidence.

The Clerk: Government's Exhibits 306 and 307 admitted into evidence.

(Thereupon documents identified above were received in evidence and marked U. S. Exhibits Nos. 306 and 307, respectively.)

Mr. Fleming: Exhibit 308, ledger card of B. H. Chan, Bank of America, Chinatown branch.

The Court: It will be received in evidence.

The Clerk: Government's Exhibit 308 admitted in evidence.

(Thereupon the document identified above was received in evidence and marked U. S. Exhibit No. 308.)

Mr. Fleming: The Government rests, your Honor.

The Court: Well, a consummation devoutly to be wished. I assume you have some motions?

Mr. Sullivan: Yes, your Honor, if your Honor would grant me some time to present them as I feel they properly should be, if your Honor probably could arrange to give the ladies and gentlemen a short recess.

The Court: Well, it is obvious that we can't finish [2115] this case this week. I have to be in Los Angeles, I am advising you now, ladies and gentlemen, on Tuesday and Wednesday of next week. That will be the 14th and 15th. So we will go over until Monday. I will take up those matters with counsel in your absence.

Until Monday, the 13th, and then we will have to finish the case on the 16th, 17th and 18th, because I have to be in Tacoma, Washington, on the 20th where I will be for three months. So I am advising you of that schedule, ladies and gentlemen, so that you may have it in mind.

Mr. Fleming: Yes, your Honor.

Mr. Sullivan: I had this in mind, your Honor, when I made the reference to recess. I just made reference to recess during the time I would read the motion, and at that time I would like to consult your Honor's wishes for time for argument, which I don't believe will be long on the motion.

The Court: Do you intend to produce witnesses?

Mr. Sullivan: Yes. I have them outside, your Honor, and it would be my desire now to discommode them further. I have had them in readiness for a couple of days and they have been very good about it. I would like to get through with them as soon as possible. I think if I made these motions

right now I could pretty well indicate to your Honor my ideas of the scope of argument, and the matter of those witnesses, so as to save time for everyone. [2116]

The Court: Very well, we will take a short recess, ladies and gentlemen.

(Short recess.)

(The following proceedings were had outside the presence of the Jury.)

Mr. Sullivan: May it please your Honor, the defendant in this case at this time enters two motions, a motion to strike and a motion for judgment of acquittal.

The motion to strike, for the convenience of the Court and counsel, I have reduced to writing. It is entitled, "Motion to strike evidence" and I ask leave of Court to file the motion in that form as supplemented by a short oral motion pertaining to some testimony I have in mind. I hand counsel a copy of the motion.

The Court: Let the motion to strike evidence be filed and supplemented by oral argument.

Mr. Fleming: If the Court please, at this time I would like to file a memorandum with respect to elements of proof wtih regard to certain citations and quotations.

The Court: It may be filed.

Mr. Sullivan: I also move to strike, if your Honor please, all evidence of the witness George Gibbons pertaining to all of his various trips to Watsonville, Bakersfield, Alviso, Yosemite Club,

Hollywood Club, 3600 San Pablo, The Palms, upon the grounds that such evidence is irrelevant [2117] and immaterial and has not been connected up with the issues of the case, and in form vague and speculative and of such a character as to have no probative value in this case.

Now, before I address myself to your Honor in connection with the motion to strike, both written and oral, may I at this time make a motion for judgment of acquittal?

At the conclusion of the Government's case the defendant in the above-entitled action, Chin Lim Mow, respectfully moves the above-entitled court for an order dismissing the charge contained in the first count of the indictment in the above-entitled action on the following grounds:

1. The evidence is insufficient as a matter of law to justify or sustain a verdict of guilty.

2. The evidence is insufficient to establish a violation of Section 145 (b), Internal Revenue Code, 26 USC Section 145(b).

3. The evidence fails to show that said defendant is guilty of the offense charged in the first count of the indictment.

4. The evidence received in connection with the said first count of said indictment is as consistent with the innocence of this defendant as with his guilt.

5. The evidence shows that there is no substantial evidence of fact which excludes every other hypothesis but that of guilt.

6. The said first count of said indictment fails to [2118] state facts sufficient to constitute a violation of Section 145, Internal Revenue Code, 26 USC Section 145(b).

As ground for said motion and as part of said motion defendant moves and specifies:

(a) That the corpus delecti of the offense attempted to be charged in said indictment has not been established.

(b) That the starting point of the net worth and expenditures method of proving income relied upon by the Government has not been clearly and accurately established by competent evidence.

(c) That the opening net worth of the defendant for the tax year covered by said count 1 of said indictment has not been clearly and accurately established by competent evidence.

The defendant further respectfully moves the above-entitled court for an order dismissing the charges contained in the second count of the indictment in the above-entitled action and for a judgment of acquittal on the following grounds:

1. That the evidence is insufficient as a matter of law to justify or sustain a verdict of guilty.

2. The evidence is insufficient to establish a violation of Section 145(b) Internal Revenue Code, 26 USC Section 145(b).

3. The evidence fails to show that said defendant is guilty of the offense charged in the second count of the indictment. [2119]

4. The evidence received in connection with said second count of said indictment is as consistent with the innocence of this defendant as with his guilt.

5. The evidence shows that there is no substantial evidence of fact which excludes every other hypothesis but that of guilt.

6. Said second count of said indictment fails to state facts sufficient to constitute a violation of Section 145(b) of the Internal Revenue Code, United States Code Section 145(b) of Title 26.

As a ground for said motion with respect to said second count of the said indictment and as a part of said motion, defendant moves and specifies:

(a) That the corpus delicti of the offense attempted to be charged in said second count of said indictment has not been established.

(b) That the starting point of the net worth and expenditures method of proving income relied upon by the Government has not been clearly or accurately established by competent evidence.

(c) That the opening net worth of the defendant spouse for the tax year covered by said second count of said indictment has not been clearly or accurately established by competent evidence.

(d) The evidence fails to disclose that this defendant [2120] wilfully or knowingly attempted to evade and defeat a large part of income tax due and owing by the Chin Wong Shee to the United States Government for the calendar year 1945 by filing or causing to be filed with the Collector of Internal Revenue a false and fraudulent income tax

return for and on behalf of said Chin Wong Shee or in any other manner whatsoever.

May it please the Court, I would like to address the Court briefly with respect to the two motions which I have presented, and I am going to make my remarks with respect to both motions of appropriate length, having in mind that I would like to have some witnesses who are waiting in the witness room give some evidence before the conclusion of today's session.

(Whereupon argument was presented by counsel for the defendant; reported, but not transcribed.)

The Court: The record will show that all motions, including the motion to strike, including the motion for acquittal, are denied.

Bring in the Jury.

Mr. Sullivan: May the record show an exception, if your Honor please, to the Court's order denying the motion to strike, both in written form and orally, and exception, if your Honor please, to your Honor's order denying the motion for judgment of acquittal.

The Court: The record will so show. [2121]

Mr. Fleming: May we have a brief recess, if the Court please?

The Court: Very well.

(Short recess.)

(The following proceedings were had in the presence of the Jury in the courtroom.)

The Court: Proceed.

Mr. Sullivan: If your Honor please, although your Honor has already permitted me to have it noted in the record, for the sake of the convenience of the record may I also make a statement at this time that one of the defense witnesses, Chan Doak Chow, has testified before this Court and Jury on Friday, September 26, 1952, so that we may have an orderly sequence of the witnesses in the record. Your Honor at that time gave your approval to have that testimony in that part of the record just as if it were introduced by the defense when the defense case starts.

Just want to make that notation in the record so the record will be logically clear.

The Court: Very well.

Mr. Sullivan: Call Mr. William Hogan.

The Court: The record will show that the witness Hogan has previously been sworn. [2122]

WILLIAM HOGAN

was called as a witness by the defendant, previously sworn.

Direct Examination

By Mr. Sullivan:

Q. Mr. Hogan, you have testified here before as a witness for the prosecution, haven't you?

A. Yes. sir.

Q. Now, are you familiar with the premises at 723-725 Grant Avenue? A. Yes, sir.

Q. And can you tell the ladies and gentlemen of

(Testimony of William Hogan.)

the Jury generally where that building is located, or where that address is?

A. It is a piece of property on Grant Avenue, west line of Grant Avenue between Sacramento and Clay Streets.

Q. Now, during the year 1945 was there a restaurant on those premises?

A. Yes, there was.

Q. And what was the name of the restaurant, to the best of your recollection?

A. Hang Far Low.

Q. Were you at that time acting as a manager of that property in connection with the collection of rents? A. Yes, sir.

Q. With whom did you have dealings as the agent for collection of rents, so far as collecting rent from the Hang Far [2123] Low Restaurant? Do you recall the gentleman's name?

A. In the restaurant?

Q. Yes. A. Mr. B. K. Chan.

Q. That is not Mr. B. H. Chan here, the defendant? A. No, sir.

Q. Mr. B. K. Chan; is he also known as Chan Bow Kay? A. Yes, sir.

Q. Now, do you recall an incident in the year 1945 concerning the payment to you of his delinquent rent? A. Yes, sir.

Q. And can you tell us, please, just what occurred in connection with the payment of this—strike that.

Was this delinquent rent delinquent rent from

(Testimony of William Hogan.)

the Hang Far Low Restaurant? A. Yes, sir.

Q. And can you place for us the time approximately in 1945 when the incident occurred?

A. Yes, I—it was in September of 1945.

Q. And what, in brief, were the details surrounding the payment of this delinquent rent?

A. Well, the tenant wouldn't pay his rent and it was necessary for us to bring suit. And we had to place a keeper on the premises. When we placed a keeper on the premises, why, then, we got a rush call one afternoon that one of the— [2124] they wanted the keeper to go and wanted to pay the penalty.

Q. By they, do you mean Chan Bow Kay?

A. Yes, Chan Bow Kay, or the Hang Far Low Restaurant. I believe it was a partnership or a corporation, I don't know which.

Q. Then what happened?

A. Well, we were called off the golf course. Mr. McLaughlin, who is the attorney, and myself, come down to Chinatown so that Mr. McLaughlin could take the keeper out of the premises and we received the rental.

Q. Now, do your records show and have you ascertained from your records whether you received some rental from these premises as delinquent rent?

A. Yes, sir.

Q. In September, 1945? A. Yes, sir.

Q. And how much? A. $5,440.

Q. And what was the date on which you received it?

(Testimony of William Hogan.)

A. The date entered in our account is September 11.

Q. Now, do you recall the person from whom you received the rent?

A. Yes, it was a Mr. Chan Doak Chow, I believe.

Q. Well, do you recall where you received it?

A. Yes, I received it at—we received it at Waverly and [2125] Washington.

Q. Who was present at that time when you received it?

A. Mr. Chan Doak Chow, Mr. McLaughlin and myself.

Q. And then did you take the rent back and deposit it in your general office trustee account?

A. No, we took it immediately to the bank, since it was Saturday afternoon.

Q. I see.

Mr. Sullivan: I would like to direct the attention of the ladies and gentlemen of the Jury, if your Honor please, to the translation of the document BT, which is the translation, being defendant's Exhibit in evidence BT-1, the document testified to by the witness Chan Doak Chow in which the date of the document is September 8, 1945, referring to the payment of delinquent rent of $5,440, and also to the incident of payment of a sum of $17,000.

No further questions.

(Testimony of William Hogan.)

Cross-Examination

By Mr. Fleming:

Q. This $5,440 paid in currency?

A. Yes, I believe it was.

Q. What kind of bills?

A. That I don't remember.

Q. Did you receive any payment of $17,000 in currency while you were there?

A. No, I did not. [2126]

Mr. Fleming: No further questions.

Mr. Sullivan: May this witness be excused?

The Court: You may be excused, Mr. Hogan.

(Witness excused.)

Mr. Sullivan: Call Mr. Goodfellow, if your Honor please.

RAY GOODFELLOW

was called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name and occupation to the Court and Jury.

A. I am Ray Goodfellow, accounting officer for the Franchise Tax Board, State Franchise Tax Board.

Direct Examination

By Mr. Sullivan:

Q. How long have you been an employee of the Franchise Tax Board, Mr. Goodfellow?

(Testimony of Ray Goodfellow.)

A. Since 1936.

Q. And what generally, is the function of the Franchise Tax Board in the State of California?

A. To collect, assess and collect taxes.

Q. Does that include personal income taxes?

A. Yes, it does.

Q. Now, have you produced pursuant to subpoena the record of certain tax payments made by Chin Lim Mow and Chin Wong Shee?

A. Yes, I have. [2127]

Q. Residing at 380 Vernon Street, Oakland, California?

A. That is not the address that I have, but I have those accounts.

Q. Yes, and was that the address on the subpoena that was served on you?

A. Yes, I believe it was.

Q. These, as a matter of fact, are the same accounts you produced at the first trial, aren't they?

A. Yes.

Q. Have you identified the accounts as being the accounts of these parties who live at 380 Vernon Street? A. Yes, I have.

Q. Now, what documents have you produced?

A. I brought the 1938 taxpayers ledger for Chin Lim Mow and Chin Wong Shee.

Mr. Sullivan: Now, at this time, if your Honor please, I would like to have marked as Defendant's Exhibit BQ for identification personal income tax individual ledger of the Franchise Tax Board for Chin Lim Mow, and as Defendant's Exhibit for

(Testimony of Ray Goodfellow.)

identification BR the personal income tax individual ledger of the Franchise Tax Commissioner for Chin Wong Shee. And may I, with your Honor's permission, and upon the request of the witness use the photostats which we have made of the official ledger cards which the witness tells me he must return to Sacramento. [2128]

The Court: You may do so. I assume there is no objection, Mr. Fleming?

Mr. Fleming: No objection.

The Clerk: Defendant's Exhibits BQ and BR for identification.

(Thereupon documents identified above were marked U. S. Exhibits Nos. BQ and BR for identification.)

Q. (By Mr. Sullivan): Now, directing your attention to Defendant's Exhibits BQ and BR, are these official records of the State of California?

A. Yes, they are.

Q. And do you identify them as the records of the taxpayers Chin Lim Mow and Chin Wong Shee? A. Yes.

Q. For the period stated? A. Yes.

Q. Do these records show payments made on account of tax liability of Chin Lim Mow and Chin Wong Shee? A. Yes.

Q. And they are records kept in the ordinary course of the business of the Franchise Tax Board?

A. Yes, they are.

Mr. Sullivan: Offer them in evidence, if your

(Testimony of Ray Goodfellow.)

Honor please, as Defendant's Exhibits BQ and BR in evidence.

The Court: Be received and marked, accordingly. [2129]

The Clerk: Defendant's Exhibits BQ and BR in evidence.

(Thereupon documents previously marked Defendant's Exhibits BQ and BR for identification were received in evidence.)

Q. (By Mr. Sullivan): Now, referring you to Defendant's Exhibit BQ, which is the ledger card for Chin Lim Mow, do you find on that account any payments made upon the income tax liability of the defendant Chin Lim Mow during the year 1945 to the State of California? A. Yes.

Q. Now, have you at my request—I will strike that.

Have you totaled the payments at all?

A. To some extent.

Q. Well, first of all, point out for me by referring to Defendant's Exhibit BQ, point out for me the dates and amounts of payments in 1945?

A. On February 15, 1945, $6.21. On that same date, $95.68. On April 15, 1945, $1590.80. And on July 5, 1945, $1955.13. On October 29, 1945, $1382.-70. And on that same date, October 29, 1945, $117.-30.

Q. Now, are you able to state for us from an examination of those and any other records whether any of those payments which you have enumerated

(Testimony of Ray Goodfellow.)

in the year 1945 pertain to the 1944 state income tax of the defendant Chin Lim Mow?

A. No, none that I have given you so far.

Q. None that you have given us so far. Now, do you find that [2130] there is an entry on your ledger account for the 1944 state income tax of Chin Lim Mow?

A. No, there is no entry on the ledger account for the reason that this payment in 1945—the other payment is in payment of what we call a fully paid return, that is, the money is received with the return and we handle that something like a department store handles a cash sale, we don't make any ledger card for it, but there was a—do you want the payment?

Q. Not yet. I want you to tell me then what is the total amount of money paid on account of the income taxes of the defendant during the year 1945 according to your schedule ledger account, which is BQ in evidence. Have you that total?

A. I am not sure I understand, you want the total amounts of payment I have given you plus this other one?

Q. No, the total amount of payments you have given me already. A. $5,147.82.

Q. May I have that again? A. $5,147.82.

Q. Now, can you tell us by reference to BQ in evidence, taking each payment up separately, what the payment was for?

A. Yes, it was in payment of deficiency arbitrary for 1938, all the payments.

(Testimony of Ray Goodfellow.)

Q. All of those payments? [2131]

A. All of those payments were in payment of that.

Q. Now, have you at my request examined the records of the Franchise Tax Board to ascertain whether any of the $5,147.82 paid on account of the defendant's liability in 1945 was due to penalty?

A. Yes, I have.

Q. And is it? A. No, sir.

Q. Is it all due to either the principal amount of the tax liability owed to the State of California and interest? A. That's right.

Q. Now, taking up Defendant's Exhibit BR in evidence, which is the ledger card for the taxes of Chin Wong Shee, this is the wife of Chin Lim Mow, can you tell us what your card reflects there with respect to payments in 1945?

A. In 1945? On February 15, 1945, $95.68. On that same date, $6.21. On April 15, 1945, $1376.07, and on July 5, 1945, $1,053.74. On October 29, 1945, $1,000. That is all.

Q. And can you tell us the total of those payments made on account of the liability of Chin Wong Shee during the year 1945?

A. That amounted to $3,531.70.

Q. And have you at my request examined your records to ascertain if any of that total which you have given me was in payment of a penalty assessed against Chin Wong Shee? [2132] A. Yes.

Q. And what is the answer? A. It is not.

Q. Was all that payment of $3,531.70 on account

(Testimony of Ray Goodfellow.)

of liability for principal amount of the tax and for interest? A. That's right.

Q. Now, do you have, have you brought with you the 1944 state income tax returns of Chin Wong Shee and Chin Lim Mow? A. Yes, I have.

Q. And what do they reflect with respect to the amount of tax reported?

A. On April 15, 1945, there were filed, and in each case $1,078.20 was paid.

Q. What document do you have before you there?

A. I just have a note. I have the returns in my briefcase.

Q. Well, you can refresh your recollection from your notes there, Mr. Goodfellow; it isn't necessary to pull the returns out. Just tell me what is that amount again? A. $1,078.20.

Q. And is that the amount of tax reported on the income tax for the State of California for 1944 for Chin Lim Mow? A. Yes, it is.

Q. And is there a similar amount for Chin Wong Shee? A. Yes.

Q. That would make—do your records indicate that a [2133] remittance was received with the reported tax?

A. That is the amount of the remittance.

Q. That is the amount of the remittance. That would make then a total payment of $2,156.40, is that correct? A. Yes.

Q. Now, is that amount of $2156.40 which was paid on account of the 1944 state income taxes of

(Testimony of Ray Goodfellow.)

Chin Lim Mow and Chin Wong Shee included in the total amounts of payments which you have given me off of Defendant's Exhibit BQ and BR in evidence? A. No.

Q. In other words, the totals that you have given me off of BQ and BR in evidence are in addition to this amount of $2156.40? A. Yes, it is.

Q. As payments in 1945.

Mr. Sullivan: At this time, if your Honor please, I would like to direct the attention of the Jury to the defendant's tax return, Exhibit 1 in evidence, for 1945, which shows a deduction of the state income tax in the form of $2,156.40 and an identical figure to the figures read off by Mr. Goodfellow as having been received by the State with the 1944 returns, and also direct the ladies and gentlemen of the Jury's attention to the fact that no exception is taken or appears on this return for either the sum of $5,147.82 or $3,531.70 or any part of those figures, the only deduction [2134] being taken is the amount of $2156.40.

The Court: May I inquire from you the significance of this, Mr. Sullivan?

Mr. Sullivan: Yes, your Honor, the point——

The Court: He is not charged with violating the State income tax laws.

Mr. Sullivan: No. The significance of this is this: that the defendant paid approximately to the State of California $8,600 in 1945 of state taxes, which were not deducted from his federal income tax return.

(Testimony of Ray Goodfellow.)

The Court: Oh, that is your point?

Mr. Sullivan: Yes, your Honor.

The Court: Very well.

Mr. Sullivan: And as I said in my opening statement we are going to show that there were more deductions omitted from the return than income items omitted.

Q. Now, incidentally, do you find any payments on defendant's Exhibits BQ and BR made on account of income tax liability of the defendant—strike that.

Do you find any payments made on Defendant's Exhibit BQ as having been made in 1943 on the income tax liability of Mr. Chin Lim Mow?

A. Yes.

Q. And what payments do you find there?

A. On that Exhibit you have, the first two; one on July [2135] 22, 1943, of $1250, and on November 1, 1943, of $500.

Q. And what is the total payments then made during 1943? A. On those two?

Q. Yes.

A. I have an additional one that is on the '38 tax that is on that exhibit, there is an additional one, too.

Q. What is the additional one?

A. The additional one is in payment of his 1942 return received in 1943, on April 15, with which he paid $770.04.

Q. Then in 1943, you first have a payment of $770.40, and then you have two additional pay-

(Testimony of Ray Goodfellow.)

ments, do you not, from Defendant's Exhibit BQ?

A. That is right.

Q. And how much do the three of those payments total? A. $2,520.04.

Q. And do you find, referring you to the comparable records for Chin Wong Shee, that is to Defendant's Exhibit BQ, and to any comparable record you may have for her, do you find that payments were made on account of her tax liability to the State of California in 1943?

A. Yes, on the '38 account also a part of the exhibit, there was $1250 on July 22nd, 1943, and $500 on November 1, 1943, and on April 15, 1943, with her 1942 income tax return $770.04.

Q. Now, how much does that make the total of payments in [2136] 1943? A. $2,520.04.

Q. Now, do any of those totals you have given me for 1943 represent interest on state taxes, or are they all principal amounts of the taxes?

A. Well, of course, there is $1750 in each case—no, let's see, $1750 in Chin Lim Mow that ordinarily would be applied against the principal first because it was one of the first payments, first two payments on 1938 account which would indicate nothing charged against interest.

Q. And was anything charged against interest?

A. In either case I would say no.

Q. All right.

Mr. Sullivan: I will direct the ladies and gentlemen's attention, if your Honor please, to Exhibits 5 and 6, being the 1943 return of the defendant and

(Testimony of Ray Goodfellow.)

his wife respectfully and we find no deductions for state income taxes so far as the principal amount of the tax is concerned, the only item appearing on the return is an item interest on taxes, 852, on Exhibit 5.

Mr. Fleming: May it please the Court, I must dispute——

The Court: I didn't hear you, Mr. Fleming.

Mr. Fleming: I said I dispute the information supplied by Mr. Sullivan as what is shown on the Chin Lim Mow return as deduction for taxes, says "Taxes State Inc. $770.04, and [2137] on the front of Chin Lim Mow's there is deduction for taxes headed "State income" $770.04.

Mr. Sullivan: Well, with the exception—I am looking at the attachment. With that exception. There is a deduction on the face, but on the attachment the only deduction, if your Honor please, on Exhibit 5, in addition to the one mentioned by counsel, is the sum of $852 interest on taxes and the similar amount on the attachment to Exhibit 6, which is the return of Chin Wong Shee, and on the face of Chin Wong Shee's return there is a deduction of $770.04, the figure quite close to the figure read by the witness.

The Court: You accept that explanation?

Mr. Fleming: Yes, your Honor.

Mr. Sullivan: No further questions.

(Testimony of Ray Goodfellow.)

Cross-Examination

By Mr. Fleming:

Q. Mr. Goodfellow, you referred first of all to 1944 tax returns of the defendant Chin Lim Mow and Chin Wong Shee. I believe you said you had those returns with you? A. Yes, I have.

Q. And those were the amounts which you said were $1750, some such amount?

A. Yes, $1750—wait a minute.

Mr. Sullivan: Ten seventy-eight.

The Witness: $1078.20. [2138]

Mr. Sullivan: I wrote it on the board.

Q. (By Mr. Fleming): For all your total tax relating to taxes in what year?

A. 1938, excepting there is—there was 1943 paid in 1944. Also have those returns. All the other tax refers to 1938.

Q. So your testimony then relates to the 1938 taxes of Chin Lim Mow and Chin Wong Shee, is it not? A. Yes.

Q. Now, I will direct your attention and you have produced here personal income tax individual ledger, is that what these documents are?

A. Yes, that is what they are.

Q. Now, I will direct your attention to the—I will ask you when those—what date did these 1938 taxes first appear on your books?

A. June 9, 1943.

Q. Now, I will direct your attention in these

(Testimony of Ray Goodfellow.)

photostats to these dates June 25, 1943, second D, what is that?

A. Second statement and demand.

Q. And the writing after that in pencil, what is that figure?

A. That means sent to the field, that the account was sent to the field for collection on July 10, 1943.

Q. Now, what is the amount of these 1938 state of California [2139] taxes? Tell me those amounts, please?

A. Yes, for Chin Lim Mow, $6,780.52.

Q. These are figures which first appeared on your books in June, 1943? A. Yes.

Q. And we are dealing here with the State of California income taxes? A. That's right.

Q. Now, what was the Chin Lim Mow tax?

A. $6,780.52.

Q. That's tax?

A. That is the whole thing.

Q. And what was Chin Wong Shee?

A. $6,668.11.

Q. $6,668.11? A. That's right.

Q. You know Mr. F. R. Morgan?

A. Yes, I do.

Q. Who is he?

A. He is now acting chief of the personal income tax division of the Franchise Tax Board.

Mr. Fleming: I will ask there be marked for identification individual income tax return, year 1938, Chin Lim Mow, Government's Exhibit next in order; an individual income tax return, Chin Wong

(Testimony of Ray Goodfellow.)

Shee, Government's Exhibit next in order. [2140]

The Clerk: Plaintiff's Exhibits 348 and 349 for identification.

(Thereupon documents identified above were marked U. S. Exhibits Nos. 348 and 349 for identification.)

Q. (By Mr. Fleming): Now, I will show you these two documents and ask you, 349 being the tax of Chin Wong Shee and 348 Chin Lim Mow, and ask you if you identify that as a certification of your department that those are certified copies of the original 1938 returns, Chin Lim Mow and Chin Wong Shee? A. Yes, I can.

Mr. Fleming: Offer in evidence, if the Court please, as Government's Exhibits 348 and 349.

Mr. Sullivan: If your Honor please, I don't see the purpose of these returns. The matter developed by the witness is as to what taxes were paid during the year 1945 and the other years that I brought out with respect to the manner the defendant and his wife reported those taxes. I don't see how that is relevant, how the return is relevant.

Mr. Fleming: Relates to whether or not they are properly deductible. Mr. Sullivan has given us part of the transaction.

The Court: I am inclined to admit them in evidence, and I will do so.

The Clerk: Government's Exhibits 348 and 349 in evidence. [2141]

(Testimony of Ray Goodfellow.)

(Thereupon documents previously marked U. S. Exhibits Nos. 348 and 349 for identification were received in evidence.)

Q. (By Mr. Fleming): Now, will you tell me the amount of income reported in 1938 and the amount of tax reported in 1938 by Chin Lim Mow and Chin Wong Shee?

A. According to this return?

Q. Yes.

A. This copy? Chin Lim Mow net income $4,589——

Q. $4,589—— A. Fifty-five cents.

Q. And the amount of tax reported by Chin Lim Mow, 1938? A. $29.90.

Q. $29.90. Now, how about Chin Wong Shee?

A. Chin Wong Shee net income $4,589.59.

Q. Same figure? A. Yes.

Q. The amount of tax reported in that return?

A. $20.90.

Q. $20.90?

A. Yes, twenty dollars ninety cents.

Mr. Fleming: At this time I will ask that there be marked as Government's exhibit next in order a document dated November 16, 1942, headed "Notice of additional personal income tax proposed to be assessed, Chin Lim Mow."

The Clerk: Government's Exhibit 350 for identification. [2142]

Mr. Fleming: And as Government's exhibit next in order a document headed "Notice of additional

(Testimony of Ray Goodfellow.)

personal income tax proposed to be assessed, March 12, 1943, Chin Lim Mow."

The Clerk: Plaintiff's Exhibit 351 for identification.

Mr. Fleming: As Government's exhibit next in order, "Notice of additional personal income tax proposed to be assessed, Chin Wong Shee, November 16, 1942."

The Clerk: 352 for identification.

Mr. Fleming: And finally, "Notice of additional personal income tax proposed to be assessed, March 12, 1943, Chin Wong Shee."

The Clerk: Plaintiff's Exhibit 352 for identification.

The Court: How long do you propose to be with this witness?

Mr. Fleming: Probably five minutes, your Honor.

The Court: You have any redirect?

Mr. Sullivan: Maybe one or two questions going to these documents, won't be of consequence, your Honor.

Q. (By Mr. Fleming): Mr. Goodfellow, I will show you the four exhibits just marked and ask you if you can identify those as copies certified by Mr. Morgan under his hands and notarized by him, records of your office? A. Yes, I can.

Q. And do those purport to be assessments on the dates indicated against Chin Lim Mow and Chin Wong Shee? [2143] A. Yes.

Q. In connection with the year 1938. And are

(Testimony of Ray Goodfellow.)

those in fact the assessments whose figures you have identified on these personal income tax ledgers introduced as defense exhibits?

A. Part of them seems to be this assessment that I——

Q. I will direct your attention to the two dated March 12, 1943. To these two (indicating).

A. What was it you wanted me to identify again, please? There's a couple here I don't seem to have any record of.

Q. Do these relate to the year 1938?

A. These two, yes.

Q. And the same two taxpayers?

A. Yes, but I don't think you meant that. Is that it?

Q. These two (indicating).

A. These two? Yes, those are assessments that appear.

Q. Well, it is the same amounts as the original?

A. Yes.

Mr. Fleming: Offered in evidence as Government's Exhibits 350 to 357.

The Court: They may be received.

The Clerk: Government's Exhibits 350 to 353.

(Thereupon documents identified above were received in evidence, marked U. S. Exhibits Nos. 350, 351, 352 and 353, respectively.)

Q. (By Mr. Fleming): Now, I direct your attention to elicit [2144] a point of time of these two documents, the one dated November 16, 1942, being

(Testimony of Ray Goodfellow.)

Exhibits 350 and 352, and ask you first of all, if you will tell me—read the title of that document?

A. "Notice of additional personal income tax proposed to be assessed."

Q. And those of November, 1942?

A. November 16, 1942.

Q. Now, what is the amount of the income assessed on that date against Chin Lim Mow?

A. Revised net income?

Q. Yes.

A. Incidentally, I am out of my ken in this. $5,885.78.

Q. Five thousand——

A. Eight hundred eighty-five and seventy-eight cents.

Q. And for Chin Wong Shee?

A. $5,885.78.

Q. And what is the tax computed on that basis in November, 1942?

A. Additional tax, you mean?

Q. Yes. A. $12.96 in each case.

Q. Additional tax twelve dollars and what?

A. Ninety-six cents.

Q. In each case. Now, will you direct your attention to the [2145] other two documents which bear the date March 12, 1943, and tell me, first, what the amount of income assessed against Chin Lim Mow is in that document?

A. You mean the revised net income, is that what you are asking me?

Q. Yes. A. $80,885.78.

(Testimony of Ray Goodfellow.)

Q. And what is the revised net income for Chin Wong Shee?

A. The same amount, $80,885.78.

Q. Are those the figures on which the items which you have given me of $6,780.52 and $6,668.00 are computed? A. Yes, they are.

Q. Now, will you read the text of—oh, by the way, will you give me, first of all, to whom these notices are addressed? Give me the address of the one for Chin Lim Mow.

A. "Chin Lim Mow, care of David S. Shew, 823 Grant Avenue, San Francisco."

Q. Now, will you read me the text at the bottom which is typed in?

A. "This arbitrary notice of proposed additional assessment was issued because of impending expiration of the statute of limitations. If information is promptly submitted showing the proposed assessment should be reduced or the notice withdrawn, adjustment may possibly be made without the necessity of a formal protest being filed in accordance [2146] with the last paragraph of this notice."

Q. Now, you say your figures were these figures which were entered upon your ledger some sixty days later on the exhibit which you previously identified? A. Yes.

Q. Now, do you have any knowledge as to how that income and as to what basis the income for the year 1938, Chin Lim Mow, was increased from roughly under $10,000 to in excess of $160,000?

A. No, I am sorry, I don't.

(Testimony of Ray Goodfellow.)

Q. Are you able to indicate, other than from the documents before you, as to whether or not that arbitrary assessment was punitive in nature?

Mr. Sullivan: I object to that, if your Honor please, as calling for a conclusion and opinion of the witness.

The Court: Objection sustained.

Q. (By Mr. Fleming): Do you have any further information with respect to the assessment other than what you have given us in these documents? A. No, I haven't.

Mr. Fleming: If your Honor will pardon me, a minute? I have no further questions.

Mr. Sullivan: No questions, your Honor please, and I move to strike the exhibits introduced by counsel, the individual income tax returns—what are they? Exhibits [2147] 348 through 353, and the testimony pertaining thereto, because it quite clearly appears, if your Honor please, I respectfully submit, that they do not in any way tend to establish what counsel said he was going to establish, a different character of payment.

The witness' testimony is clear in the record that the payment was made during the year 1945, and it was paid on account of the principal amount of tax and on account of interest and no part penalty.

Mr. Fleming: This evidence, if the Court please, is offered as facts available to the Jury as bearing on the question of whether the payment was in the nature of tax or in the nature of penalty.

The Court: The motion will be denied. Ladies

(Testimony of Ray Goodfellow.)
and gentlemen of the Jury, we will adjourn at this time until Monday morning at 9:30. Again you are admonished not to discuss the case among yourselves or with others, and not to form or express an opinion about the matter until such time as it is finally submitted to you.

Monday morning at 9:30.

Mr. Sullivan: May the witness be excused?

The Court: Mr. Goodfellow, you may be excused.

The Witness: Thank you. I think there are some returns of mine there.

Mr. Fleming: I will return the returns to you.

(Thereupon this cause was adjourned to Monday, October 13th, 1952 at the hour of 9:30 a.m.) [2148]

October 13, 1952 at 9:30 A.M.

The Clerk: United States of America vs. Chin Lim Mow, on trial.

Mr. Fleming: Ready, your Honor.

Mr. Sullivan: Ready, your Honor.

The Court: You may proceed.

Mr. Sullivan: Call Mr. Wilkinson.

MORRIS WILKINSON

was called as a witness on behalf of the Defendant, sworn.

The Clrek: Please state your name and occupation to the Court and Jury?

A. Morris Wilkinson, accountant.

(Testimony of Morris Wilkinson.)

Direct Examination

By Mr. Sullivan:

Q. How long have you been an accountant, Mr. Wilkinson?

A. For approximately ten years.

Q. And are you self-employed or are you employed by a firm?

A. I am employed by Wallace and Meyers.

Q. And is that the firm of which Mr. William Wallace is a partner or member? A. It is.

Q. How long have you been employed by Wallace and Meyers?

A. About two years and ten months. [2149]

Q. Now, Mr. Wilkinson, are you a certified public accountant?

A. No. However, I have passed the examination for a certified public accountant, but it requires that you have three years experience and I still need a couple of months.

Q. You say it is only a couple of months?

A. Yes.

Q. And according to the prevailing requirement of your profession, you say you have passed the examination for a certified public accountant?

A. I have.

Q. And at the end of those couple of months that you mention will you receive your certificate as a certified public accountant?

A. Yes, upon application to the State Board,

(Testimony of Morris Wilkinson.)

they review your experience and then issue this certificate.

Q. Now, can you tell us something about your professional education and training, and, generally speaking, about your education which might have a bearing upon your profession?

A. Well, I got a BCS degree from—which is a Bachelor of Commercial Science—at Golden Gate College here in San Francisco, and had about a year and a half or two years in accounting there. A BCS is an accounting degree there.

Q. You received your Bachelor of Commercial Science degree from Golden Gate College after the completion of how many years of collegiate [2150] work?

A. It was at least four years of night work.

Q. After that you had some postgraduate work at Golden Gate College? A. That is right.

Q. Did your courses consist of courses in accountancy?

A. Yes. They covered, oh, I think three years of general accounting and a year in tax accounting and a year in auditing and cost accounting and mathematics of accounting.

Q. Mr. Wilkinson, in preparation for the trial of this case and at the request of Mr. Hubner and myself, have you examined certain books and records of the Gerdon Land Company for the purpose of making an analysis as an accountant?

A. I have.

Q. I will show you Exhibit 56, which is a book

(Testimony of Morris Wilkinson.)

called general ledger of Gerdon Land Company, and Exhibit 56-A, and ask you if you are familiar with those books?

A. Yes, I have reviewed these books.

Q. You have reviewed these books?

A. Yes, sir.

Q. And from your association with the firm of Wallace and Meyers are you familiar with the fact that those books, during the time that you have been employed in the office, have been maintained by those accountants? A. Yes, I have.

Q. And I will show you, also, Defendant's Exhibits CL through [2151] CP, which are books of, first, the Mandarin Hotel, San Fran Hotel, the Sherman Hotel, the Alpine Hotel and the Bayshore Auto Court, and ask you if in the preparation for this analysis you also examined those books?

A. I reviewed certain parts of these books.

Q. And are those books, similarly, books maintained by the firm of Wallace and Meyers during the time that you have been associated with that firm? A. They are.

Q. And can you tell us if you considered, besides the books of the Gerdon Land Company and the hotel books which I have indicated to you, did you consider in making your analysis any other records?

A. We had the duplicate copies of the Hogan and Vest statements in our office.

Q. That is, the statements of rentals received?

A. Yes.

(Testimony of Morris Wilkinson.)

Q. And did you examine those?

A. Yes. We also had some remittance advices from Mr. Allen's office, which we reviewed.

Q. Are those, generally speaking, the advices that were received by the firm of Wallace and Meyer as to the deposits made to the account of Gerdon Land Company, the bank account?

A. Yes. They were a sort of a memo form.

Mr. Sullivan: Now, may I have this marked, if your Honor [2152] please, a group of yellow columnar sheets, top of which is entitled "Gerdon Land Company summary 20 account"? May I have that marked defendant's Exhibit BS for identification?

The Court: You may.

The Clerk: Defendant's Exhibit BS marked for identification.

(Thereupon documents identified above were marked Defendant's Exhibit BS for identification only.)

Q. (By Mr. Sullivan): I will show you Defendant's Exhibit BS for identification, Mr. Wilkinson, and ask you if that exhibit and those papers are your work papers which you prepared during the course of the analysis which you described?

A. They are.

Q. And these are, are they not, the same work papers which you produced at the first trial of this case in May? A. They are.

Q. Have you made any changes in this exhibit?

A. No.

(Testimony of Morris Wilkinson.)

Q. I did obtain the release of the exhibit from the files of the Court and submitted to you for further examination, did I not? A. Yes.

Q. You did not, however, make any changes in your work papers at all, did you?

A. No. [2153]

Q. Now, can you tell us generally speaking what your working papers consisted of, without going at present into the material that is in them.

A. Well, it was an analysis of an account 20 as Mr. Hubner—in accordance with Mr. Hubner's request to segregate the sources of the entries in that account between Mr. Chin Lim Mow and Admay and all other items in an adjustments column, and also the disbursements from that account.

Q. Then you allocate the material in making your analysis into how many classifications?

A. Three.

Q. And what are those classifications?

A. Chin Lim Mow, Admay and adjustments.

Q. Is the purpose of your analysis to establish or classify the source of the debit and credit entries in account 20? A. Yes.

Q. Will you plase give us the period of time over which your analysis extends?

A. Years 1942 through 1945.

Q. When you say 1942, is that—does that mean your analysis started in January 1, 1942?

A. Yes. I accepted the balance as of January 1st according to your instructions.

Q. In other words, the balance appearing on ac-

(Testimony of Morris Wilkinson.)

count 20 at December 31st, 1941, was accepted without making any classification, [2154] according to the directions which Mr. Hubner and I gave you?

A. That is right.

Q. Will you kindly give me again the columns or classification and headings of your analysis?

A. Well, I have a total column.

Q. Does "Total column" mean a column—well, withdraw that. What does the total column represent?

A. That is the balance in account 20.

Q. And referring you to Exhibit 56, is that the balance which appears, according to the books of the Gerdon Land Company, in account number 20?

A. Yes.

Q. And what are the classifications, again, please, into which you broke down the total column?

A. Chin Lim Mow, Admay and adjustments.

Q. Now, at December 31st, 1941, what do you find for the balance in the total column?

A. $86,285.36.

Q. And is that the figure which you placed, according to our direction, in the Chin Lim Mow column? A. It is.

Q. Do you then have any breakdown in the columns at that date which are entitled "Admay" and "Adjustments"? A. No. [2155]

A. Now, at December 31st, 1942, what do you have in the total column? A. $159,578.86.

Q. Now, does that figure represent a book figure on your working analysis?

(Testimony of Morris Wilkinson.)

A. That is the book figure as of that date.

Q. Now, that is a balance figure, is it?

A. Yes, that is the balance in account 20.

Q. Is it a credit balance or a debit balance?

A. It is a credit balance.

Q. Is the $86,285.36, is that a credit figure in both instances in which I have written it up here?

A. It is.

Q. When you say that in each of those three instances that I have on the board, that those figures represent a credit balance, does that mean that the corporation owed somebody money or was owed money by someone?

A. It means the corporation owed someone money.

Q. All right. Now, will you give me the figure in your total column at December 31, 1943?

A. $143,664.63.

Q. Is that also a credit balance?

A. It is.

Q. And at December 31, 1944?

A. $235,606.75. [2156]

Q. Is that a credit balance? A. It is.

Q. And at December 31st, 1945?

A. $306,568.83.

Q. And is that also a credit balance?

A. It is.

Q. Now, all of the figures which you have given me and which I have listed on the blackboard here under the word "Total," do those represent the figures at those dates which are credit balances in

(Testimony of Morris Wilkinson.)

account 20 as you have taken them off the books of the corporation, which are Exhiibt 56 in evidence?

A. They do.

Q. Now, what do you have in your column for Chin Lim Mow at December 31, 1942?

A. $195,582.15.

Q. And is that a credit balance? A. It is.

Q. And at that date what do you have in the column entitled "Admay"?

A. $9,857.19. That is a debit balance.

Q. And when you say that that figure is a debit balance, does that mean that it represents what the corporation owed or what was owed to the corporation? A. What was owed to the corporation.

Q. Would it be correct for me to indicate that debit figure [2157] on the blackboard here, for the purposes of illustration, by putting it in parentheses? A. Yes.

Q. Now, what have you in the "Adjustments" column at December 31, 1942?

A. $26,146.10. That is a debit balance.

Q. Now, what, for the purposes of your adjustments column, do you mean when you say the word "adjustments" in the analysis?

A. Well, if I remember, there were several items that didn't apply to either one of these segregations, and there were other items that actually applied to different years than the year 1942 in this case.

Q. Well, is it your testimony, then, that you put in the "Adjustments" column those items which you

(Testimony of Morris Wilkinson.)

did not classify either under "Chin Lim Mow" or "Admay"?

A. No, some of those items are classified under "Chin Lim Mow" or "Admay" in other years.

Q. In other years? Well, is the purpose of your adjustments column then, to make corrections as to the time of the entry? A. Yes.

Q. Now, what do you have in the "Chin Lim Mow" column at December 31, 1943?

A. $197,805.16.

Q. Is that a credit balance? [2158]

A. Yes.

Q. And in the Admay column?

A. $1,469.20.

Q. Is that a credit balance? A. Yes.

Q. And in the adjustments column?

A. $55,609.73.

Q. Is that a credit? A. Debit.

Q. That is a debit? At December 31, 1944, what do you have in the Chin Lim Mow classification?

A. $213,186.32.

Q. Is that a credit balance? A. Yes.

Q. And in the Admay column?

A. $39,519.01.

Q. Is that a credit balance? A. Yes.

Q. And in the adjustments column?

A. $17,098.68. That is a debit balance.

Q. Will you kindly give us the comparable figure at December 31, 1945, according to your analysis?

A. Chin Lim Mow, I have $248,547.70.

Q. What do you have for Admay?

(Testimony of Morris Wilkinson.)

A. $74,178.31. [2159]

Q. What do you have for adjustments?

A. $16,157.18. That is a debit.

Q. Now, directing your attention to the figure that you have given me at December 31, 1942, do the three figures which you have given us in the column "Chin Lim Mow," "Admay," and "Adjustments" represent, according to your analysis, a breakdown of the sources of the entries, whether debit or credit, in account 20? A. Yes.

Q. And that represents the balance in each of the classifications, does it not, that you have selected? A. Yes.

Q. Is it your testimony with respect to the figures that you have given us at December 31st, 1943, December 31st, 1944, and December 31st, 1945, that the several balances which you have given us under the columns "Chin Lim Mow," "Admay" and "Adjustments" represent a breakdown, according to your analysis, of the figures appearing on the book which you have given us here under the column "Total"? A. Yes.

Q. And these are the balances, are they, of the debit and credit entries in those classifications?

A. Yes.

Q. Now, Mr. Wilkinson, have you calculated the increase in the account 20 balance between December 31, 1941, and December [2160] 31st, 1942, as it appears on the books of the corporation?

A. Yes.

Q. And what is that figure?

(Testimony of Morris Wilkinson.)

A. $73,293.50.

Q. Do those figures which you have just given me represent an increase in the balance, credit balance, as it appeared at December 31, 1941, and at December 31st, 1942? A. Yes.

Q. Have you a similar figure that represents the increase in this account according to the books of the corporation, in the account itself, calculations from those books, between December 31, 1942, and December 31, 1943?

A. There was a decrease that year.

Q. There was a decrease? What was the figure?

A. $15,914.23.

Q. Now, would it be correct for me to represent that as a figure in parentheses? A. Yes.

Q. Have you a comparable figure that represents the increase in the account 20, according to the books, between the end of the year 1943 and the end of the year 1944? A. Yes. $91,942.12.

Q. Is that an increase? A. Yes.

Q. And have you a comparable figure representing the increase [2161] between December 31st, 1944, and December 31st, 1945?

A. $70,962.08.

Q. Have you similarly calculated the increase or decrease in the balances of the account which you have given us, according to your analysis, and as you have classified those analyses, "Chin Lim Mow," "Admay," and "Adjustments"?

A. Yes.

Q. Now, what do you have as the increase dur-

(Testimony of Morris Wilkinson.)

ing the year 1941 in the column "Chin Lim Mow"?

A. You mean 1942?

Q. I mean 1942. Between December 31st, 1941 and December 31st, 1942? A. $109,296.79.

Q. Do you have any figures for Admay or Adjustments comparable to that figure?

A. Yes. $9,857.19, in Admay, and $26,146.10 in Adjustments. Those are debit figures.

Q. Both of those are debit figures? Will you give me the comparable figure for the three classifications of your analysis between December 31, 1942 and December 31st, 1943?

A. In "Chin Lim Mow," $2,223.01; "Admay" $4,326.39.

Q. Is that a positive figure?

A. Yes. "Adjustments" column $29,463.63. That is a debit figure. [2162]

Q. Now, will you give me a comparable figure representing the increase or decrease between December 31, 1943 and December 31, 1944, for each of the three classifications of your analysis, namely, Chin Lim Mow, Admay and Adjustments?

A. $15,381.16; $38,049.81; $38,511.15.

Q. Is that last a negative figure or a positive figure? A. That is a positive figure.

Q. And finally, will you give me the comparable figures for these three classifications representing the increase or decrease between December 31, 1944, and December 31, 1945?

A. $35,361.38; $34,659.30; $941.40

(Testimony of Morris Wilkinson.)

Q. Is that last figure of $941.40 a positive figure?

A. It is a credit balance.

Q. It is a credit. All right, now, Mr. Wilkinson, directing your attention to the period of time between December 31, 1944, and December 31, 1945, what did you find to be the increase in accounts number 20 according to the books during that period of time? A. $70,962.08.

Q. And what portion of that figure or what did you find to be the increase for Chin Lim Mow according to your analysis during that time?

A. $35,361.38.

Q. And what did you find to be the increase for Adamy during that time? [2163]

A. $34,659.30.

Q. And then you have adjustments of $941.40, is that right? A. Yes.

Q. Is it correct to say, then, that while, according to the books which you have there, accounts payable number 20 shows an increase during the year 1945 of $70,962.08, according to your analysis that portion of the entries whose sources you have allocated to Chin Lim Mow went up only $35,361.38, is that correct? A. Yes.

Q. And similarly, Admay went up only $34,659.30, is that correct? A. Yes.

Q. Mr. Wilkinson, I will direct your attention to accounts payable number 20 and to an entry of December 31, 1945, in the sum of $6,647.39. Will you kindly find that?—strike that.

Do you find an entry at December 31, 1945, a credit entry of $8,227.99? A. Yes.

(Testimony of Morris Wilkinson.)

Q. Now, is there a cross reference there to the journal? A. Yes.

Q. Can you tell us what that entry represents according to the books by reference to the journal? There is a reference to the journal there, isn't there?

A. Yes, although the page isn't [2164] mentioned.

Q. Do you find a reference also to the cash book?

A. Yes.

Q. Well, will you see if you can locate that entry for us in the cash book? A. I do.

Q. And what does the entry as you find it in the cash book——

A. Well, the total of the December, 1945, cash receipts credited to account 20 is $8,227.99.

Q. Where is that, please point it out to me.

A. Right down here (indicating).

Q. Do you find a breakdown of that?

A. That's composed of an entry here on December 4, Chin Hing, $6,647.39, and one——

Q. That is the entry I want. The entry of $6,647.39, is that it? A. $6,647.39.

Q. All right. Is that, according to the cash book, an entry under the name of Chin Hing?

A. It is.

Q. And how does it appear then when it is carried over to account 20, as a credit? A. Yes.

Q. In other words, it is part of the credit entry of some $8,200 that you have read to me?

(Testimony of Morris Wilkinson.)

A. Yes. [2165]

Q. And that is a part of the credit entry. Will you read it to us again, at December 31, of what amount? A. $8,227.99.

Q. What is the description of that entry in account number 20?

A. In account number 20, just got "B.H.C."

Q. And I will show you a part of Exhibit 107 which is in evidence here. Do you recognize that as one of the remittance notices that you examined in connection with your analysis?

A. These are the—I don't remember this particular one, but these are the remittance advices that we had.

Q. The advices from Mr. Allen, the attorney?

A. Yes.

Q. And do you find on there the amount of $6,647.39 that you have just pointed out to us in the cash book? A. I do.

Q. And what is the description on that remittance advice? A. Chin Hing for taxes.

Q. Now, do you recall what disposition you made of this entry of $8,200 that you have just pointed out to us, which includes the amount of $6,647.39, Chin Hing for taxes; do you recall what disposition you made of that when you made your analysis?

A. I charged it to Chin Lim Mow.

Q. All right, so that you have included that in this increase figure of $35,361.39, is that correct?

A. I have. [2166]

Q. If it should be found from the evidence in

(Testimony of Morris Wilkinson.)

this case that this was not a payment which originated with Chin Lim Mow, but it was a payment that originated with Admay, what disposition would you make of that item of $6,647.39, according to your analysis?

A. Well, if it was Admay rather than Chin Lim Mow's check, it should have gone into Admay rather than Chin Lim Mow. It would increase Admay.

Q. If that were so, would this increase the Admay amount of $34,659.30? A. It would.

Q. By the amount of $6,647.39? A. Yes.

Q. And at the same time would it decrease the figure representing the increase in the Chin Lim Mow column, which is $35,361.38?

A. It would decrease that amount.

The Court: Speak a little louder, please.

The Witness: It would decrease that increase for that year for Chin Lim Mow.

Q. (By Mr. Sullivan): By how much?

A. By that, the amount of $6,647.39.

Mr. Sullivan: No further questions.

Cross-Examination

By Mr. Fleming:

Q. Are these the papers from which you [2167] made these calculations, Mr. Wilkinson?

A. Yes.

Q. Well, now, is it correct to say this, Mr. Wilkinson, is what you have done is you have taken account 20 and you have divided it two ways, and

(Testimony of Morris Wilkinson.)

part of it you put under the column Chin Lim Mow and part you put under column Admay?

A. That's correct, and then those items that didn't affect it in those years I put under Adjustment.

Q. Did you examine the cancelled checks of the Admay Company?

A. I examined cancelled checks, I believe, for the year 1944 only. We did not have 1945, and I don't believe there were any checks prior to '44 for Admay, to the best of my knowledge.

Q. You say you did not examine the 1945 Admay checks?

A. Well, I saw some of them, but they weren't in our office.

Q. Did you see a check for $20,000 in December, 1945? Are you able to tell me to whom that check was payable, December 29?

A. Can I see my work sheets a minute? You said in December of '45?

Q. '45.

A. I don't believe I did. I don't have any notation for it here.

Q. Did you examine a check for $6,000 on December 31, 1945, of Admay? [2168]

A. I don't believe so.

Q. By the way, do you have any personal knowledge of any of these '44-1945 payments?

A. What do you mean by that?

Q. Did you have anything to do with the books in '44-1945? A. No.

(Testimony of Morris Wilkinson.)

Q. And is your testimony limited to an examination of account 20 in the books? A. It is.

Q. Did you examine the cancelled checks of Gerdon Land Company?

A. I examined some of them.

Q. Did you examine the checks for 1946?

A. No.

Q. Did you make any analysis in 1946 of this account 20? A. No.

Q. Did you make any analysis in '47 for this account 20? A. No.

Q. Now, in this column "Adjustments," would it be necessary, in order to complete your examination to make an examination in '46 to see whether or not there were any adjustments which should apply to the tabulation which you have made?

A. It could change some of the items?

Q. And similarly, with respect to 1947, could that change some items? [2169]

A. It is possible.

Q. Did you discover any payments made by Gerdon Land Company out of account 20 going to any of the individuals listed as partners in the Admay Company? A. I don't believe so.

Q. You know who those individuals are, don't you, Janet Chan, Bertha Chan, and the others that are listed? A. Yes.

Q. You discover any payments in the year 1946 according to any of those individuals?

A. I didn't examine '46.

(Testimony of Morris Wilkinson.)

Q. Now, did you examine the minutes of the Gerdon Land Company?

A. I have examined some of them.

Q. Did you examine all of them?

A. I don't believe so, I don't think that we had a complete set in our office.

Q. Well, is it your testimony essentially that you looked at the entries in the books and when the books said "Admay" you put it over in this column, is that what you did?

A. No, in some cases the books, I believe, didn't say "Admay," I traced them to the tax return on which the income is reported.

Q. You base this analysis on the Admay tax return? A. Partly.

Q. You acepted Admay 1945 tax return as correct, did you? [2170] A. I believe so.

Q. That is, the Admay partnership return, '45 partnership return of income, is that the return which you accepted as correct?

A. I didn't necessarily take these figures as being correct, but the items *of reported,* as Admay income, on this return, that were reflected in 20 account I placed under that category on this analysis.

Q. Now, you were still—are you the gentleman in Mr. Wallace's office who actually keeps the Gerdon books now? A. What is that again?

Mr. Fleming: Will you read the question?

(Question read by the Reporter.)

(Testimony of Morris Wilkinson.)

A. No.

Q. (By Mr. Fleming): How about these hotel books, you have anything to do with those, the Mandarin Theatre and others?

A. Well, during the period that Mr. Peffers has been sick I have done some of the work on them.

Q. And have you been employed to do that by Mr. Wallace? A. I have.

Q. Did you in your analysis go beyond the books, account 20, the other data you have described?

A. Only to examine those other documents we had in the office that pertained to the books.

Q. Did you for example, find a $9,000 Hogan and Vest note [2171] on the Gerdon Land Company books?

A. I don't believe so, not in connection with the analysis of account 20.

Mr. Fleming: I have no further questions.

The Court: Any redirect, Mr. Sullivan?

Mr. Sullivan: No, your Honor. May the witness be excused?

The Court: You may be excused, Mr. Wilkinson.

(Witness excused.)

Mr. Sullivan: Call Mr. Andrews, your Honor.

The Court: Mr. Andrews.

FRANK T. ANDREWS

was called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name and occupation to the court and jury.

(Testimony of Frank T. Andrews.)

A. My name is Frank T. Andrews. My occupation is certified public accountant. My residence, 261 Morningside Drive, San Francisco.

Direct Examination

By Mr. Sullivan:

Q. Mr. Andrews, how long have you been a certified public accountant? A. About 27 years.

Q. And are you licensed as a certified public accountant by the State of California? [2172]

A. Yes, sir.

Q. Can you tell us briefly something about your professional education, your education generally as it bears upon your training for your profession?

A. My commercial education started when I attended the High School of Commerce here in San Francisco. After that I attended St. Ignatius University where I took academic courses. After that I attended the School of Economics of the University of London, England. On my return I attended the Brown School of Accounting, took accounting courses. I took a course with LaSalle Extension University in higher accountancy. I also took courses with the University of California Extension and the Golden Gate College.

Q. Now, have you at any time been a member of any professional societies or associations?

A. I'm a member of the American Institute of Accountants, and also the California State Society of Certified Public Accountants.

(Testimony of Frank T. Andrews.)

Q. Have you had experience with the Bureau of Internal Revenue?

A. I was employed by the Bureau of Internal Revenue from some time in 1922 until about the end of 1925 as an Internal Revenue Agent.

Q. And in the course of your duties as an Internal Revenue Agent did you have for your attention various matters having [2173] to do with the determination of tax liability? A. I did.

Q. Did you, in the course of your duties familiarize yourself with and apply an accountancy technique, a formula known as the net worth method? A. Yes, sir.

Q. Now, I assume that after you left the Bureau of Internal Revenue you started into private practice, did you? A. Yes, I did.

Q. I don't believe I asked you the present name of your firm; what is it?

A. F. T. Andrews and Company.

Q. Is it located in San Francisco?

A. Yes.

Q. And you have in addition to yourself considerable staff, do you? A. Yes, sir.

Q. Now, how long have you been practicing your profession as F. T. Andrews and Company?

A. Since early in 1926.

Q. And continuously since that time?

A. Continuously.

Q. Do you, in connection with your professional practice, specialize in any particular type of accountancy work?

(Testimony of Frank T. Andrews.)

A. No, our firm handles all types of accountancy and we [2174] also prepare income tax returns, and I usually handle the tax matters, because I'm admitted to practice as an agent before the Treasury Department and I'm also admitted to practice before the Tax Court of the United States.

Q. The Tax Court, incidentally, is a new name for the old Board of Tax Appeals, isn't it?

A. Yes, it is.

Q. And were you also admitted before the old Board of Tax Appeals? A. Yes, sir.

Q. Now, Mr. Andrews, when did you first have anything to do with this case; can you give us that date approximately? A. Last May some time.

Q. And before, let us say, the beginning of May, 1952, were you associated with this litigation in any way? A. No, sir.

Q. Had you ever done any accountancy work for Mr. Chin Lim Mow before May of 1952?

A. No, sir.

Q. Or for any member of his family?

A. No.

Q. Had you anything to do directly or indirectly with Mr. Chin Lim Mow's tax problems or tax matters before May of 1952? A. No. [2175]

Q. You have been in constant attendance at the trial of this case, have you not, before His Honor Judge Murphy? A. Yes, I have.

Q. You have listened to all the evidence, have you?

(Testimony of Frank T. Andrews.)

A. I have listened to all the testimony and I have read the reporters' transcript. [2176]

Q. Have you examined in instances the exhibits which are in evidence here? A. I have.

Q. And have you at my request prepared certain documents and analyses based upon the evidence in the case? A. Yes.

Mr. Sullivan: Your Honor please, at this time may I have marked for identification document entitled "Chin Lim Mow," and in the upper right hand corner appears "Schedule 1." The title is "Statements of net worth December 31, 1944, and December 31st, 1945."

The Court: Let it be marked.

The Clerk: Defendant's Exhibit DD for identification.

(Whereupon document referred to above was marked Defendant's Exhibit DD for identification.)

Mr. Sullivan: And may I have marked as defendant's exhibit for identification next in order a three-page document entitled "Chin Lim Mow, details to statement of net worth December 31, 1944, and December 31st, 1945;" in the upper right hand corner of which appears "Schedule 2," and upon which there appear various schedules of details as follows: "Item A, bank account; Item B, personal cash on hand; Item C, miscellaneous accounts and claims receivable; Item D, deposits; Item E, securi-

(Testimony of Frank T. Andrews.)

ties; Item F, real estate; Item G, Admay Company; Item H, Wai Yuen Club." [2177]

The Court: Let it be marked.

The Clerk: Defendant's Exhibit DE for identification.

(Whereupon document referred to above was marked Defendant's Exhibit DE for identification.)

Mr. Sullivan: I have copies of these, your Honor please, which I will at this time give to counsel for the defense. And I have copies for your Honor. Does your Honor wish the original?

The Court: No, I will take the copy.

Q. (By Mr. Sullivan): Now, I will direct your attention, Mr. Andrews, to exhibits DD and DE. Do you have photostatic reproductions of these?

A. Yes, I do.

Q. Did you prepare these documents on the evidence which has been presented in this case?

A. Yes, sir.

Q. And did you make, in the course of the preparation, the various entries which are contained in those documents? A. I did.

Q. When you incorporated the various material into the documents did you, to the best of your ability, take that from the evidence both orally produced in court, in other words, the testimony of the witnesses, and produced in written form through the introduction of exhibits? A. Yes, sir.

(Testimony of Frank T. Andrews.)

Q. And after that did you make certain calculations, additions [2178] and subtractions?

A. Yes, I did.

Q. And did you arrive, then, at certain totals?

A. Yes.

Mr. Sullivan: Offer these documents in evidence, if your Honor please.

The Clerk: Defendant's Exhibits DD and DE in evidence.

(Whereupon Defendant's Exhibits DD and DE previously marked for identification, were received in evidence.

Mr. Sullivan: May I at this time, if your Honor please, ask your Honor's permisison to pass photostatic reproductions of Defendant's Exhibits DD and DE among the ladies and gentlemen of the jury?

The Court: You may.

(Whereupon documents were distributed to the jury.)

Mr. Sullivan: May I wait, your Honor, until the ladies and gentlemen have their copies?

Q. Now, Mr. Andrews, directing your attention to the document which is DD in evidence, tell us please, first, generally what that document is, without going into the details of the analysis.

A. I was instructed to include in this statement the assets of Mr. Chin Lim Mow and his wife as developed from the testimony and evidence brought out in this trial.

(Testimony of Frank T. Andrews.)

Q. And to include those assets to what specific dates? [2179]

A. At December 31, 1944, and December 31st, 1945.

Q. Now, do you have certain calculations on that exhibit DD which relates to the net worth of Mr. Chin Lim Mow and his wife at those dates?

A. Yes, I do.

Q. And do you also on the same sheet make a comparison of the net worth increase as you have calculated it with anything?

A. I have made a comparison between the adjusted increase in net worth and the net income that was reported on the income tax returns of Mr. Chin Lim Mow and his wife.

Q. Now, tell us generally, before we go into detail, what exhibit DE represents, Mr. Andrews?

A. I thought it would be clearer if the balance sheet were more—the statements of net worth were more condensed, and I have therefore placed on Exhibit DD in certain instances summarized figures, and the details I have placed in exhibit DE as a matter of convenience.

Q. Now, I believe you told us that you are a certified public accountant, have you not?

A. Yes, sir.

Q. And these statements which you have identified here, and which are exhibits DD and DE, certified statements?

A. They are what we call and must call unaudited statements.

(Testimony of Frank T. Andrews.)

Q. And can you explain that for us, and can you explain why they are not designated "certified statements"? [2180]

A. Because I have not had the opportunity to interrogate the witness in this trial myself. Neither have I had an opportunity to audit and investigate the documentary evidence produced during this trial. Therefore, I have no information on these figures except what I have heard here in court and what I have seen in the way of evidence. Therefore, I could not say that the figures are correct insofar as certifying to them is concerned.

Q. Frequently we see in the newspaper, Mr. Andrews, a statement published by a banking house or corporation in which there is a certificate of a certified public accountant or a firm of certified public accountants attached to it. Isn't that frequently done?

A. Yes, that is done quite frequently. However, in those cases the accountants have verified all the items in the net worth statement and substantiated them from, sometimes from outside sources, to the extent that they can say that the figures they have used are accurate and correct as to the sources of the figures and inclusion of those figures in the net worth statement.

Q. Well, what I am getting at here is that these documents which you have prepared are not prepared by you in any way as having your certificate as a certified public acountant, are they?

A. They are not. [2181]

(Testimony of Frank T. Andrews.)

Q. Now, directing your attention to the first exhibit, which is exhibit DD in evidence, do you have there at the first one-half or two-thirds of the document a division between certain calculations of entries?

A. Yes. The first division is "Assets" and the second division is "Liabilities and net worth."

Q. In other words, the subtraction of the total of the second division from the total of the first division, or the liabilities from the assets, gives you the calculation of net worth, does it not?

A. The subtraction of the total "Liabilities" in the second division from the total "Assets" in the first division results in the figures of net worth.

Q. Now, directing your attention to the first entry under "Assets," will you give us that, please?

A. The first entry is "Bank accounts."

Q. And what do you have at 1945—at 1944, at December 31st, as the total amount for that entry?

A. Under this classification I have at the end of 1944, $107,352.06; and at the end of 1945, $54,-162.98.

Q. I notice that you have a reference at that entry to a schedule 2A. Is that the first schedule that appears on exhibit DE? A. Yes.

Q. May I direct your attention to schedule item A on exhibit [2182] DE? Will you kindly read that, the details of the title of that schedule?

A. "Item A, bank accounts."

Q. Generally speaking, have you classified these various bank accounts under certain division?

(Testimony of Frank T. Andrews.)

A. I did it as a matter of convenience. I thought it would be more readily understood.

Q. And what did you do?

A. Well, I grouped accounts with certain bank accounts under the heading of each bank. Although the branches may be different, I thought it would be more convenient to read in this form.

Q. So that the first four entries that you have are the details of the bank accounts, pertain to the accounts of the American Trust Company, is that your testimony? A. Yes.

Q. And the next of those items are accounts with the Bank of America? A. Yes.

Q. And so on down the line.

A. That is right?

Q. Now, will you explain to us what you have done in order to arrive at the totals for those bank accounts which appear at the bottom of exhibit A?

A. Well, I was instructed to calculate the net worth [2183] statement for Chin Lim Mow and his wife. I found, however, that among the bank accounts were accounts in the name of his wife and some of his children. In those cases I could not put down a figure as a matter of accountancy because I had nothing to guide me; therefore, I asked your direction and you instructed me in the case of the account of Chin Wah Nor and Wong Ying that I should use one-half of the account balance in this statement.

Likewise, in the account of Wong Ying and

(Testimony of Frank T. Andrews.)

Bertha Chan that I found, I took one-half. In the case of—in the instance of the account of Wong Ying and May Chew Chan and Janet Chan, I was directed to use one-third. And in the case of Wong Toy and Wong Ying I was directed to use one-half.

Q. Going back to the first account with the American Trust Company, did you in picking up the half of the balance intend that that half represent the half of Wong Ying, Mr. Chan's wife?

A. Yes. That was the purpose.

Q. And in the first account with the Bank of America that you picked up half again, as representing the interest of Mrs. Chan, who was Wong Ying? A. Yes.

Q. Similarly with the Farmers and Merchants Savings Bank, you picked up at my instructions one-third of the balance since Wong Ying is one of three names on the account, is that [2184] correct?

A. That is correct.

Q. Now, did you at any time take a different balance in making your calculations than what was stipulated and agreed to here between myself, on behalf of the defendant, and Mr. Fleming on behalf of the government? A. No.

Q. And in these other instances where no division of the account is made on item A, did you take the full amount of the balance that was agreed to and stipulated to between the defense and the government? A. Yes.

Q. For example, where we have the account of B. H. Chan and Wong Ying in the Bank of Canton,

(Testimony of Frank T. Andrews.)

what do you have at 1944 and at 1945 for that account?

A. December 31, 1944, $39.47. Same amount at the end of 1945.

Q. And that was an account in the name of husband and wife, was it not? A. Yes.

Q. So you included the full balance of that account, is that correct? A. That is correct.

Q. You arrived at certain totals on exhibit A, Mr. Andrews, which is the first schedule on exhibit DE, and will you kindly give us the total amount of assets represented by bank accounts [2185] at December 31, 1944, and December 31, 1945?

A. The total for bank accounts at the end of 1944, $107,352.06; and at the end of 1945, $54,-162.98.

Q. Did you then carry those totals over to your exhibit DD as the first entry of that exhibit?

A. That is correct.

Q. Now, Mr. Andrews, there has been some testimony in this case about a balance of $17,500 which appears from documentary evidence in this case to be the balance at December 31, 1945, in a trustee account maintained by Howard Chang and Evelyn Lee Chang, his wife, in the Pacific National Bank at San Francisco. There was also testimony to the effect that, by the government, that that balance was included in the detail of bank accounts. Did you in preparing item A or in making your first entry of bank accounts include that $17,500?

A. I did not.

(Testimony of Frank T. Andrews.)

Q. Now, referring you to exhibit DD, which is the net worth statement, will you please give us the second entry that you have there?

A. The second entry is "Personal cash on hand, December 31, 1944, $58,396.85; December 31st, 1945, none."

Q. Now, do you have a reference to a schedule which is the supporting details for this entry?

A. I do.

Q. And what is that? [2186]

A. On schedule 2, Item B.

Q. That is the second schedule on the second sheet of document which is exhibit DE, is it not?

A. Yes.

Q. And will you kindly read me the descriptive heading of item B?

A. "Personal cash on hand, December 31, 1944, representing only that portion of defendant's cash on hand identified during the course of the trial."

Q. Now, can you explain to us what you have done in developing the details of this schedule, which is item B? A. Yes.

Q. Read us the first item, please.

A. The first item, dated January 4, 1945, "Currency delivered to Alameda East Bay Title Insurance Company in the amount of $13,346.85."

Q. I notice you have a reference for that.

A. Yes. Mr. Corbett's testimony on page 292 of the transcript.

Q. Can you tell us, generally, what was the sub-

(Testimony of Frank T. Andrews.)

stance of that testimony upon which you made that entry and calculation?

A. It was testified that currency was deposited by Mr. Chan on that date with the Alameda East Bay Title Insurance Company.

Q. Was this the amount of currency that had to do with the purchase of premises at 1555 Oak Street, do you recall? A. I believe it was. [2187]

Q. What is the next entry?

A. January 10, 1945, currency to Norman Ogilvie on the Hobart and Telegraph purchase in the amount of $5,300, in accordance with Mr. Ogilvie's testimony on page 700 of the transcript."

Q. And the next entry?

A. Dated "January 13, 1945. Currency to W. A. Wallace for taxes, $12,600, as testified to by Mr. Wallace and shown on page 1,169 of the transcript."

Q. Was that the incident described in the testimony where Mr. Chan, being confined to his home, gave Mr. Wallace $12,600 with which he purchased a cashier's check to pay certain income taxes of the children? A. It is.

Q. And the next item?

A. Next item is headed "January 15, 1945. Currency in John J. Allen, Jr., Trustee, $1,150, as testified to by Mr. Allen and shown on page 624."

Q. And the next item?

A. Next item, dated January 24, 1945, "Currency with Norman Ogilvie on purchase of 23rd and Broadway, $25,000, according to his testimony shown on page 704 of transcript."

(Testimony of Frank T. Andrews.)

Q. Now, what did you calculate on item B for the total of the various amounts of currency appearing in the testimony at various dates you have indicated? [2188] A. $58,396.85.

Q. Did you then treat that as personal currency or cash on hand at December 31, 1944?

A. I did.

Q. And did you then carry the total from exhibit DE, item B, over to exhibit DD, which is the first single paper for your net worth statement for the defendant? A. Yes.

Q. You say that with respect to the personal cash on hand, you found no testimony of the existence of any in the record, is that correct?

A. At December 31st, 1945?

Q. Yes. A. Yes.

Q. Now, what is the next item that you have?

A. "Gerdon Land Company Account."

Q. Now, when you say "Gerdon Land Company Account," what do you mean?

A. I am speaking of the account No. 20 on the books of Gerdon Land Company.

Q. Now, have you in making this entry treated the account on the unsegregated basis as it appears on the books, or have you treated it upon a segregated basis or a basis which has been analyzed?

A. I have segregated the account into the amount due Chin [2189] Lim Mow and into the amount owing to Admay Company.

Q. What do the two figures that you have opposite "Gerdon Land Company" as the third entry there, do they represent the amount to Chin Lim

(Testimony of Frank T. Andrews.)

Mow alone or do they represent an amount due Chin Lim Mow and others?

A. I was directed to make this a statement for Chin Lim Mow. Therefore, those figures represent the amount due Chin Lim Mow.

Q. And what figures do you have in the two dates you have taken for your balance sheet?

A. At December 31st, 1944, $208,623.42; December 31, 1945, $238,278.81.

Q. Now, I notice that you have a reference there to an exhibit. A. Exhibit BS.

Q. And what is that exhibit?

A. That was the exhibit by Mr. Wilkinson.

The Court: We will take a recess at this time.

Mr. Sullivan: Yes, your Honor.

The Court: Take a recess for a few minutes, ladies and gentlemen.

(Short recess.) [2190]

Q. Mr. Andrews, before we take up this third entry which is the entry relating to the Gerdon Land Company, account 20, there is one question I forgot to ask you in connection with your analysis of the personal cash on hand in item B. Did you include in that entry of personal cash on hand at December 31, 1945, the $70,000 of which there was testimony in this case that was deposited into the bank account of Howard Chang and Evelyn Lee Chang by Evelyn Lee Chang or an unknown person on January 3rd or 4th, 1946? A. No.

Q. Now, referring you again to the Gerdon Land

(Testimony of Frank T. Andrews.)

Company account, will you tell us, how you arrived at the totals which you have indicated there as the defendant's interest in that account at December 31, 1944, and December 31, 1945?

A. At December 31, 1944, I took the balance shown by Mr. Wilkinson in his analysis of his total of account 20, $235,606.75, and I added to that two corrections that were made by the Government, one correction of $12,536.68 in regard to alterations made at 8th and Webster Street where the entry was not made on the Gerdon books until 1946.

I also made a correction that was made by the Government in the amount of $10,500 in regard to the Mandarin Theater. After those two adjustments are added to the figure that Mr. Wilkinson showed in his analysis, the total Gerdon account 20 which I have corresponds to that shown by the [2191] Government at that point.

Then I subtracted from that figure the amount which is allocated to the Admay Company and I carried that under a different item in my net worth statement. Those two same adjustments that were made on the basis of the Government's corrections for the end of 1944 I also made as of the end of 1945.

Q. Now, in the course of arriving at your totals for the Gerdon Land Company account which you have indicated here, did you take into account a check charged to that account under the name of Chin Hing in the amount of $6,647.39?

(Testimony of Frank T. Andrews.)

A. Yes, I omitted to say that. At the end of 1945 I also corrected the balance on the basis of Mr. Wallace's testimony and also on the basis of Mr. Wilkinson's testimony for the amount of $6,649, and I believe it was thirty-nine cents, which was erroneously shown in account 20 as having come from Mr. Chan, whereas it came from the account of Admay.

Q. Now, what is the next item that you have on Exhibit DD which is the net worth statement that you have prepared?

A. Miscellaneous accounts and claims receivable.

Q. Do you have a separate schedule for that, too?

A. Yes, the detail of that item will be found in schedule 2, item C. That is page 2 of schedule 2.

Q. And how have you entitled that item appearing on the second page of Exhibit DE? [2192]

A. Miscellaneous accounts and claims receivable.

Q. What is the first item that you have there under accounts receivable?

A. The first item is account receivable and under that category I have placed the amount due from Chan Bow Kay of $17,000 at the end of 1944 and the account due from David Chew in the amount of $3,000 at the end of 1945.

Q. Now, have a reference there to the testimony in respect to the placing of the amount of $17,000 as receivable at the beginning of the period?

A. Yes, I refer to page 1294 of the report.

Q. And that is the testimony of what witness?

(Testimony of Frank T. Andrews.)

A. Chan Doak Chow.

Q. Chan Doak Chow, is that correct? Now, I notice that you have the $17,000 appearing at the opening but you do not have it appearing at the closing, and what is the reason for that, based upon the testimony in this case?

A. The account was paid during the year 1945.

Q. And in connection with that do you have reference to the testimony on that subject bearing upon the payment of that $17,000 on or about September 13, 1945? A. Yes.

Q. Similarly with David Chew you do not have the $3,000 at the opening, do you?

A. No. [2193]

Q. Is that based upon the fact that the $3,000 was loaned by the defendant to Mr. Chew during the course of the year?

A. According to Mr. Chew's testimony.

Q. So that you have included it then at the end of the period, have you? A. Yes.

Q. Now, what are the other items of these miscellaneous accounts and claims that you have listed in Item C there?

A. Well, under the heading of claims receivable I have listed claim against the estate of Wilbur Pierce in the amount of $17,509.47 at the end of 1944, and $20,935.07 at the end of 1945. Also, the American Distilling Company stock deal——

Q. Well now, before you go on to that, on what have you based your entry of the first claim, which is the claim against the estate of Wilbur Pierce?

(Testimony of Frank T. Andrews.)

A. Exhibit 257 in evidence.

Q. And is that the photostat of the claim that Mr. Farley produced and was filed with the Superior Court in Alameda County by the defendant?

A. Yes.

Q. All right. Now, will you please take up this item referring to the American Distilling Company stock?

A. According to Internal Revenue Agent Wiley that amount was—the amount of $61,000 was due to Chin Lim Mow at the [2194] end of 1944 and at the end of 1945.

Q. So you have taken Mr. Wiley's statement in that respect? A. Yes.

Q. How about the next item?

A. The next two items, United Trading Corporation and United Food Supply Company appear to be a claim against Howard Chang, the first in the amount of $10,000 at the end of 1944, and also at the end of 1945. The check in the amount of $23,937.71 at the end of 1944 and at the end of 1945, and both of these items are shown in Exhibit 242.

Q. And is that the document that Mrs. Evelyn Lee Chang produced here in court, which was an English translation of a claim according to her testimony made by the defendant? A. Yes.

Q. Now, you have calculated the totals of these details, have you, on item C? A. Yes.

Q. And what do you do with those totals after you calculate them?

(Testimony of Frank T. Andrews.)

A. I carry them to the statement of net worth, Exhibit DD.

Q. And that is the first single sheet that you have here? A. Yes, sir.

Q. Is that correct? And will you tell us then what those miscellaneous accounts and claims receivable are carried at and the various [2195] dates?

A. At the close of 1944, $129,147.18, and at the end of 1945, $118,872.78.

Q. What is the next item that you have on Exhibit DD? A. The next item is deposits.

Q. And do you have a supporting schedule for that?

A. Yes, detail of that account will be found in schedule 2, page 2, item D.

Q. Now, will you kindly explain to us what deposits you have taken into account in your schedule item D?

A. Under date of October 24, 1944, a deposit was made in connection with the Mandarin Theater of $2,000, according to the testimony of Mr. Hogan at page 585 of the reporters' transcript.

On October 27, 1944, a further deposit in connection with the Mandarin Theatre of $3,000, which is found at the same page of the transcript.

On November 6, 1944, a deposit of Hobart & Telegraph of $2,500 in accordance with Mr. Olgivie's testimony on page 715.

On November 14, 1944, a further deposit in connection with Hobard and Telegraph, $12,500, also in accordance with Mr. Ogilvie's testimony.

(Testimony of Frank T. Andrews.)

On December 14, 1944, a deposit of 23rd and Broadway in the amount of $5,000, also in connection with Mr. Ogilvie's testimony.

On December 16, 1944, a deposit of $500 on 1555 Oak [2196] Street in accordance with Mr. Corbett's testimony at page 290 of the transcript.

At an unknown date, an unknown day in December, 1945, $4,500 was given to Mr. Joseph R. Deasy, and that is in accordance with the testimony of the first trial which was read into the evidence here by Mr. Fleming.

Q. And have you included that as a part of the defendant's closing net worth? A. I have.

Q. Now, there was some testimony here and some reference made by the Government to an item of $500 appearing upon the books of Mr. Hogan, the real estate agent, and pertaining to the premises at 18 to 20 Waverly Place. Do you recall that testimony? A. Yes, I do.

Q. I believe that the entry as referred to by the Government and as carried on Mr. Hogan's books, was an entry under the name of Evelyn Lee Chang. Do you recall that? A. I do.

Q. Now, have you included that $500 in this detail? A. I have not.

Q. Do you recall whether it would be an addition at the opening or an addition at the closing?

A. It would be an addition at the opening and by reason of not putting it in my statement it is a disadvantage to [2197] Mr. Chan in the calculations which I have made.

(Testimony of Frank T. Andrews.)

Q. If you had put it in like the Government it would have been an advantage to him to do so, is that correct? A. That's correct.

Q. Now, I will ask you to give me the calculations of the totals then from Item D?

A. Total deposits at the end of 1944, $25,500; at the close of 1945, $4,500.

Q. Now, have you carried those over to your net worth statement, which is Exhibit DD?

A. I have.

Q. What is the next item that you have on Exhibit DD under the classification of assets?

A. Cash surrender value of life insurance. At the close of 1944, $26,771.54, and at the end of 1945, $31,664.43.

Q. Now, are those the figures that the Government and the defense agreed upon for the purposes of this trial and were stipulated to and filed with the court? A. They are.

Q. And the next item, what do you have?

A. Securities.

Q. And do you have a supporting schedule for that?

A. Yes, that will be found on page 2 of schedule 2, Item E, and the item consists of United States government bonds, $56.25 at the end of 1944, and $6,056.25 at the end of 1945, [2198] and Western Department Store Company stock, $3,420.97 at the end of 1944, and none at the end of 1945.

Q. What was the basis of your detail on the government bonds? A. Exhibit 274.

(Testimony of Frank T. Andrews.)

Q. And in taking the government bonds did you take only those bonds that were registered in the name of the defendant and his wife?

A. Yes.

Q. How about the Western Department Store stock? I notice that you have carried none of that asset at the close.

A. Because the stock was sold in 1945.

Q. And that is reflected in the tax return, is it?

A. Yes, sir.

Q. You refer there to Exhibit 1, is that a reference to the tax return of the defendant?

A. Yes, sir.

Q. What totals have you calculated then for the schedule on securities?

A. Total at the close of 1944, $3,477.22 and $6,056.25 at the end of 1945.

Q. What is the next item of assets that you have?

A. Real estate. And the detail of that item is found in Schedule 2, page 2, item F.

Q. That is the second page of Exhibit DE, is it? [2199] A. Yes.

Q. Now, will you kindly explain what you have done there to arrive at the totals that you have included in your net worth statement?

A. This is another tabulation that I inserted in the schedules in this manner because I thought it would be easier to understand when reading the statement of net worth.

(Testimony of Frank T. Andrews.)

Q. Now, is it all based on the evidence in the case? A. It is.

Q. You explain it to us, please?

A. The first item is land and improvements, and the second item is less depreciation, and the third item is add Pierce Building. For the end of 1944 I show the land and improvements $288,975.43, and have subtracted from it the depreciation of $32,-628.49, and I show a depreciated value of $256,-346.94.

Q. Now, let me ask you right there, is that good accounting practice to handle it the way you have handled it?

A. Because that is the way it is customarily handled, with the exception of public utilities.

Q. In other words, the depreciation figure is made a part by you here in this analysis, is made a part of the figure which is included in the asset portion of the balance sheet, is that correct?

A. That's correct. [2200]

Q. And you do not carry the depreciation figure separately as a liability entry, is that correct?

A. That's right.

Q. Now, what is the figure commonly called and what do you call it in this instance which is arrived at by subtracting the depreciation figure from the figure representing the land and improvements?

A. The figure of depreciation is the theoretical figure and ordinarily it would be just as correct to carry the figure of $256,346.94 by itself as the value of land and buildings. It would be just as correct

(Testimony of Frank T. Andrews.)

to show that item by itself. But in order to be informative, many balance sheets, statements of net worth show what the depreciation is calculated to be and subtracted from the asset value and come to the value of the land and improvements. That is what it is, the depreciated figure is the theoretical, actual value—theoretical and yet actual, because there is no way of figuring depreciation except on the basis of theoretical life, so therefore I would say that the $256,346.94 is the true value.

Q. Now, have you made a similar subtraction for the value of the land and improvements at the end of 1945? A. Yes.

Q. And what figure do you arrive at for depreciated cost of the assets at that time? [2201]

A. $531,244.55.

Q. Now, you say you have added the Pierce Building, is that correct?

A. I added the net worth of the Pierce Building.

Q. And was that a figure, was it obtained from the evidence? A. Yes, sir. [2202]

Q. Did you make any adjustments to the figure of net worth—withdraw that. Tell us, Mr. Andrews, where you obtained the figures that you have here for the Pierce Building at the end of 1944 and at the end of 1945?

A. I took those from exhibit 316, both of them, but at the close of 1945, I made a subtraction of $123.89 for the distributive share of Howard Chang in the operating profit of the Pierce Building in 1945. I did that on the authority of exhibit 30.

(Testimony of Frank T. Andrews.)

Q. Now, have you calculated, then, the totals for 1944 and 1945 with respect to the item entitled "Real estate"?

A. Yes. I show a total at the end of 1944 of $301,969.35; and at the close of 1945, $576,404.09.

Q. What is the next item that you have on exhibit DD? A. Lions Den.

Q. And how have you carried that?

A. At the close of 1944, the value, $25,000, and the same at the end of 1945, in accordance with exhibit 283.

Q. In other words, have you carried that the same way the government has carried it, according to the evidence? A. Yes.

Q. And what is the next entry you have under "Assets" on exhibit DD?

A. "Admay Company partnership interest."

Q. Do you have a separate schedule on [2203] that?

A. Yes, sir. That is found in schedule 2, page 3, item G.

Q. Now, will you tell us generally, before you go over the details of this Admay Company schedule, tell us generally what you have done on this separate schedule.

A. Well, I have assembled in one place all of the assets that I could find in the evidence of the Admay co-partnership.

Q. And what is the first asset that you treat in this schedule, item G?

(Testimony of Frank T. Andrews.)

A. "Account receivable, Gerdon Land Company," which is the adjusted amount as segregated by Mr. Wilkinson on the blackboard here this morning.

Q. Then what have you in 1944 and what have you in 1945?

A. At the end of 1944, $39,519.01; at the close of 1945, $801,825.70.

Q. The second item is what, Mr. Andrews?

A. Account receivable from the Elite Company.

Q. What entries have you there?

A. At the close of 1944, $27,330. At the end of 1945, none.

Q. Can you tell us where you obtained the opening figure of $27,330, and what you did according to the evidence in order to arrive at that figure?

A. I obtained that figure from exhibit 270, and that figure represents the amount that was paid to Admay by the Elite Company in 1945 as shown by that schedule.

Q. And does it also represent the amounts paid to Admay by [2204] the Elite Company, according to the various checks which were introduced in evidence here, checks of the Elite Company?

A. Yes.

Q. The next item is what?

A. The next item is "Elite Company investment."

Q. When you say "investment," investment of whom or what?

A. Investment of Admay in the Elite Company.

(Testimony of Frank T. Andrews.)

Q. And what have you there at the end of 1944 and at the end of 1945?

A. I have no balance at the end of 1944, and the amount of $11,400 at the end of 1945.

Q. What is the basis of your inclusion of this amount, Mr. Andrews?

A. The basis is exhibit 270, and I have made an adjustment and have reduced—I would like to change that. I have made an adjustment. Exhibit 270 shows the investment of Admay at the close of 1945 in the amount of $16,000. I have reduced that amount by $4,600. This $4,600 represents an adjustment to the capital investment in the Elite Company.

Q. Now, is that the $4,600 about which there was testimony during the testimony of Mr. Farley as to the source of the $4,600 as an intended capital investment for three gentlemen whose Chinese names were read off to the Court here? Is that the same $4,600 item?

A. Same $4,600 item. [2205]

Q. What is the next item that you have there for Admay Company?

A. The next item is the Bank of Canton commercial account, which is the same figure that the government includes in its schedule of cash in banks and on hand.

Q. And what is the figure at the end of 1944 and what is the figure at the end of 1945?

A. At the end of 1944, $3,603.72; at the end of 1945, $2,000.43.

(Testimony of Frank T. Andrews.)

Q. Now, the next item, or the next three items are items pertaining—strike that. The next five items are items pertaining to the operations of certain hotels and an auto court by the Admay copartnership, are they not?

A. No, those five items represent the net worth of the five Admay hotels as shown by the balance sheets prepared by, I believe it was, Internal Revenue Agent Farley.

Q. My question was merely directed to this point: that they are the same establishments that are represented in the Admay partnership return as having been operated by the Admay Company.

A. Oh, the hotels?

Q. Yes. A. Yes. Oh, yes.

Q. But these figures represent net worth, do they? A. They do.

Q. And you have taken Mr. Farley's figures in each instance? [2206] A. Yes.

Q. Without having to detail those figures for us, can you tell us at what totals you arrived for these nine assets that pertain to the Admay Company?

A. At the end of 1944, $83,470.17; at the close of 1945, $109,571.15.

Q. Now, at my instructions did you take a divisible sixth of that and charge it to the defendant, who appeared as one-sixth partner in the Admay Company? A. I did.

Q. And what is that calculation that you have made, or that quotient that you have arrived at?

(Testimony of Frank T. Andrews.)

A. At the end of 1944, $13,911.69; at the end of 1945, $18,261.86.

Q. Now, what have you done with those figures, with those totals that appear on that schedule 2G?

A. I have carried them to exhibit DD.

Q. The next entry under "Assets" in exhibit DD is what, Mr. Andrews, please?

A. Wai Yuen Club.

Q. And have you a separate schedule explaining your calculations for this entry?

A. Yes. That will be found on page 3 of schedule 2 under item H.

Q. Will you kindly turn to that item H of exhibit DE and [2207] explain to us generally, first what you have done there?

A. I have assembled from the testimony, and in one instance at your direction, the accountancy pertaining to the Wai Yuen Club, Wai Fong Company and Wai Lee Company at the end of 1944 and 1945.

Q. Have you in preparing this detail classified your material under two groups, assets and liabilities? A. Yes.

Q. Tell us what is the first asset that you have on the separate schedule.

A. The first asset is the bank account which, at the end of 1944, was an overdraft of $942.46, and at the close of 1945 was a balance of $1,135.90.

Q. And the next item?

A. The next item is deposit on lease, $500 at the end of each year.

Q. What is the basis of that item, please?

(Testimony of Frank T. Andrews.)

A. Exhibit 186.

Q. Is that that portion of exhibit which was testified to by the witness David Shew?

A. Yes.

Q. And the next item?

A. Furniture and fixtures. This is a depreciated figure, $992.11 at the end of 1944 and $5,877.63 at the end of 1945.

Q. Is that based on Mr. Shew's same [2208] exhibit? A. Yes.

Q. And the next figure or entries?

A. The next entry is "building," and that is likewise a depreciated figure, $21,331.90 at the end of 1944; $30,146.66 at the end of 1945.

Q. And the next figure?

A. The next figure is "Cash on hand," at the end of 1944, $47,259.40; at the end of 1945, none.

Q. Now, did you make those entries for cash on hand at my instructions? A. I did.

Q. Is the $47,259.40 the actual amount according to the testimony of Inspector Overstreet—strike that. Have you included in this figure or by using this figure of $47,259.40 the actual amount testified to by Inspector Overstreet?

A. It includes the sum of $42,259.40 which the Inspector says he seized at the club on February 4, 1945, and his estimate of $5,000 in coin.

Q. Now, is this the same figure that Mr. Brady testified about in connection with his testimony about an estimated figure that he used of $50,000?

A. Well, I can't speak for how Mr. Brady con-

(Testimony of Frank T. Andrews.)

sidered it. However, the $50,000 which he put in his balance sheet can be compared with this figure of $47,259.40 which I have placed in my balance [2209] sheet.

Q. Well, my question was directed to this point: is the $47,000 figure that you have, is that a figure obtained from the same incident in the testimony as the $47,000 figure that Mr. Brady mentioned which was the basis for his $50,000 figure?

A. Well, he refers to the same testimony.

Q. All right. Now, in placing this figure of $47,-259.40 as an asset at December 31, 1944, of the Wai Yuen Club, did you consider the testimony of Inspector Overstreet that the Club he raided and from which he got that money was the Wai Yuen Club?

A. The Wai Yuen Club.

Q. Do you have any figure for cash on hand for the Wai Yuen Club at December 31, 1945?

A. No.

Q. Have you found any figure in the evidence as cash on hand for that club at December 31, 1945?

A. No.

Q. You have some liabilities calculated there for the Wai Yuen Club, and will you kindly explain that to us, which appear in the lower portion of your exhibit, schedule item H?

A. Withholding tax payable end of 1944, none; close of 1945, $5,219.80, in accordance with exhibit 186. And loans payable, $32,000 at the close of 1944, and $48,000 at the close of 1945, also in accordance with exhibit 186.

(Testimony of Frank T. Andrews.)

Q. Is that $5,219.80 figure the figure that was developed by [2210] Mr. Shew on his balance sheet?

A. Yes.

Q. And by the loans payable figures the same figures that appear on the material developed by Mr. Shew, and also appear on his worksheets and about which he testified here in Court?

A. They are.

Q. Now, have you made a subtraction—well, strike that. What is your next figure?

A. My next figure is net worth.

Q. And how is that obtained?

A. That figure is obtained at the end of 1944 by subtracting the liabilities of $32,000 from the total assets of $69,140.95.

Q. And as——

A. The net worth then was $37,140.95.

Q. What have you done comparably for the date 12/31/45?

A. I have subtracted the amount of withholding tax and loans payable, which total $53,219.80, algebraically on the total assets at the end of 1945 of $37,658.19, which, for the purposes of convenience, shows a negative net worth of $15,561.61.

Q. Now, what have you done with the net worth figure which you have calculated on exhibit 2H?

A. I have inserted them on exhibit DD.

Q. Now, do the figures which you have inserted on exhibit DD opposite the entry "Wai Yuen Club" represent the net worth of the defendant as calculated by you? [2211]

A. Yes.

(Testimony of Frank T. Andrews.)

Q. In other words, you are treating him as the sole proprietor in this instance, aren't you?

A. Oh, yes.

Q. What is the next entry that you have there?

A. Wai Lee Company.

Q. Now, is that the liquor company?

A. Yes, that is the liquor store.

Q. And what figure do you have at December 31, 1944, and December 31, 1945?

A. At the close of 1944 I show a value of $1,-333.40; and at the end of 1945, $3,208.53.

Q. Now, will you kindly tell us the basis of your calculations of the two figures you have just read?

A. The amounts shown on exhibit 282 in evidence.

Q. And the next entry you have is what?

A. Elite Company.

Q. Will you please give us the figures?

A. At the end of 1944, $20,100; at the end of 1945, $15,000.

Q. And what is the basis of those figures which result in the two amounts you have given us?

A. The figure at the end of 1944 represents the sum of the checks paid to Chin Lim Mow or taken by him in 1945, plus his capital interest at the end of 1944.

Q. Can you give us a breakdown on that or have you that in [2212] your work papers?

A. Yes. The checks issued to him or taken by him were $13,100. The capital investment was $7,000.

(Testimony of Frank T. Andrews.)

Q. And that makes a total of $20,100?

A. Yes, sir.

Q. Do those figures which you have just given us as the breakdown of that figure of $20,100 appear on exhibit 270, which was the schedule introduced here by Mr. Farley, the revenue agent?

A. I took the figures from exhibit 270.

Q. How did you arrive at the figure of $15,000, Mr. Andrews, for the Elite Company at December 31, 1945?

A. That is the amount shown on exhibit 270 as capital contributions of Chin Lim Mow and his wife.

Q. Do you recall what those amounts were that comprise the total of $15,000?

A. Yes. His capital interest was $8,000 and his wife's, $7,000.

Q. What is the next entry that you have under "Assets" in exhibit DD?

A. Tai Sun Company, partnership interest.

Q. And what are the figures for that, please?

A. $1,000 at the end of each year.

Q. And the next entry?

A. Western Supply Company, partnership interest, $500 at the [2213] end of each year.

Q. Now, have you prepared each of those last two entries upon the testimony of Mr. Wiley, the former revenue agent? A. Yes.

Q. Did you make an addition of all the assets of the defendant and his wife at the end of 1944 and at the end of 1945?

(Testimony of Frank T. Andrews.)

A. Yes. At the end of 1944 they total $960,-523.69; and $1,077,348.12 at the close of 1945.

Q. Now, the next part of your net worth statement pertains to what general classification?

A. Liabilities and net worth.

Q. And what is the first item of liabilities that you have there on exhibit DD?

A. Real estate loans.

Q. And what figure do you have for real estate loans in each of those date you have heretofore indicated?

A. At the close of 1944, $112,449.76; at the end of 1945, $265,066.71.

Q. Where did you get those figures?

A. From exhibit 311.

Q. Were those the figures that were stipulated to and agreed to between the defense and the government for the purposes of this trial?

A. Yes, sir.

Q. 311 is the written stipulation, is it not? [2214]

A. Yes, sir.

Q. You examined that, did you? A. Yes.

Q. And the next entry you have is what?

A. "Loans on life insurance at the close of 1944, $18,703.40; at the end of 1945, $20,021.68."

Q. Is that also based upon the figures that were agreed to and incorporated in a written stipulation between the defense and the government?

A. Yes.

Q. And the third item of liabilities is what?

(Testimony of Frank T. Andrews.)

A. Hogan and Vest first report, at the end of 1944, none; at the end of 1945, $5,000.

Q. What is the basis of the testimony with respect to this loan, do you recall?

A. It is the testimony of Mr. Hogan at page 587 of the reporter's transcript.

Q. And do you recall the testimony here of Mr. Brady in which I asked him some questions about an entry he had on his detail of deposits for $5,000 at December 31st, 1945? Do you recall that?

A. Yes, I recall it.

Q. Do you recall I have—strike that. Did you examine the transcript in ascertaining or verifying the $5,000 item which you have here listed as a liability? [2215] A. Yes, sir.

Q. Do you find any deposit of $5,000 resulting from the transactions testified to by Mr. Hogan which is a deposit to be carried at December 31, 1945, for the Manadrin Theatre; that is, did you find an asset rather than a liability?

A. Well, I thought that Mr. Brady explained that situation satisfactorily. He showed an asset and a liability, but that was a slip of the pen.

Q. Yes. In other words, those washed themselves out, as you accountants say, is that correct?

A. Yes.

The Court: I believe we will take a recess now. We will adjourn now, ladies and gentlemen of the jury, until two o'clock this afternoon. Bear in mind the admonition heretofore given you.

(Testimony of Frank T. Andrews.)

(Thereupon this cause was adjourned till the hour of two o'clock p.m. this date.) [2216]

October 13, 1952. 2:00 P.M.

The Court: You may proceed, gentlemen.

FRANK T. ANDREWS

called as a witness on behalf of the defendant, resumed the stand, previously sworn.

Direct Examination
(Continued)

By Mr. Sullivan:

Q. Mr. Andrews, at the time of the luncheon recess we had reached a point in your explanation of Exhibit DD where the total liabilities or total of the liability items appear. Have you calculated a total for the liabilities? A. Yes.

Q. And what is that?

A. The total liabilities at the end of 1944, $131,-153.16; at the end of 1945, $290,088.39.

Q. Now, is the figure of net worth obtained by subtracting the liabilities from the assets?

A. Yes, it is.

Q. And did you make that subtraction in this case? A. I did.

Q. And what did you arrive at for the net worth of the defendant at December 31, 1944?

A. $829,370.53. [2217]

Q. And at December 31, 1945?

(Testimony of Frank T. Andrews.)

A. $787,259.73.

Q. Now, according to your calculations did the net worth of the defendant increase or decrease during the year 1945, which is the year charged in the indictment in this case?

A. There was a decrease.

Q. And can you give us the amount of that decrease? A. It is $42,110.80.

Q. Do you obtain that decrease in this instance by subtracting the smaller of the figures from the larger? A. Yes.

Q. And is this then a negative figure?

A. That is a negative figure.

Q. Indicated by parentheses? A. Yes.

Q. Now, Mr. Andrews, this morning in discussing one of the items of the assets, namely, the bank accounts, you told the ladies and gentlemen that upon my instructions you had taken in the instances where the bank accounts were in the names of other people along with the defendant or his wife, you had only taken a portion of the bank account, that is, a half or a third, as the case may be. You recall that testimony? A. Yes, I do.

Q. Now, by so doing did that result in an advantage to the [2218] defendant in these calculations or did it result in a disadvantage?

A. It was a disadvantage to the defendant because the amounts that were eliminated at the end of 1944 were larger than the amounts eliminated at the end of 1945.

Q. And I also note that you have a footnote to

(Testimony of Frank T. Andrews.)

Exhibit DD which is made in reference to the balance sheet you have just explained for us. Would you mind reading that note for us?

A. It says, "Note: for lack of evidence the foregoing assets show no value for the defendant's interest in American Four company and Hing Wah Tai Company."

Q. Did you make an examination of the evidence in this case both the testimony of the witnesses and the documentary evidence to ascertain if you could find information which you could use as a balance sheet information for those companies?

A. I looked for the information, but could not find any.

Q. Now, you have then a calculation of a decrease in net worth of $42,110.80, is that correct?

A. Yes.

Q. And what is the next calculation then that you have on Exhibit DD?

A. The next calculation is add back to an increase in net worth non-deductible expenses. [2219]

Q. Now, is that the same procedure that the Government followed? A. Yes.

Q. And have you used the same additions back to net worth that the Government used?

A. Yes.

Q. And then did you make certain subtractions from the adjusted figure after that?

A. Yes, I subtract non-taxable income.

Q. Is that the same figure that is subtracted by the Government in its calculations?

(Testimony of Frank T. Andrews.)

A. Yes.

Q. And what do you arrive at then as the figure representing taxable net income on a net worth basis for Mr. Chan and his wife? A. $121.42.

Q. Now, according to the established formula of a net worth calculation do you now proceed to make a comparison of this taxable net income figure with something? A. Yes.

Q. And what do you compare it with?

A. I compare it with the net income reported in the income tax returns of Chin Lim Mow and his wife.

Q. Now, have you in your balance sheet included only those assets which refer to the defendant, Mr. Chin Lim Mow, and [2220] his wife?

A. I have included such items as appears, able to identify, as pertaining to Chin Lim Mow and his wife.

Q. Have you excluded assets that you identified as pertaining or being carried under the name of members of his family? A. Yes, I have.

Q. Now, in making the comparison then do you compare Mr. Chin Lim Mow's assets only with his reported income? A. Yes.

Q. In doing that, Mr. Andrews, do you conform to accountancy practice to your tax practice?

A. Exactly.

Q. Now, can you tell us what is meant by you accountants when you say that you conform the accountancy practice and the tax practice when you

(Testimony of Frank T. Andrews.)

make these calculations of a net worth reconstructed figure?

A. Well, broadly speaking, where we have business assets, that is, assets plus income, in determining a taxable net income on a net worth basis we compare the increase in those assets as adjusted by non-deductible expenses or non-taxable income with the income reported in the return of the persons who own those assets.

Q. Now, what do you find then or what do you have as a figure with you compare the taxable net income figure of $121.42? [2221]

A. The net income reported by Chin Lim Mow and his wife for the year 1945 was $54,341.66.

Q. Now, does that result then in, for the purposes of this calculation, an under-reporting of income or an over-reporting of income?

A. It indicates that the income reported was excessive.

Q. To what extent?

A. To the extent of $54,220.24.

Q. Is that a negative figure?

A. That would be a negative figure.

Q. Now, Mr. Andrews, have you found any testimony in this record on living expenses?

A. No, sir.

Q. If you were required in your calculation to take into account a factor of living expenses, what would happen to that figure of $54,220.24?

A. It would be reduced.

(Testimony of Frank T. Andrews.)

Q. By the amount that had been determined upon for living expenses, is that correct?

A. That's correct.

Q. So it would be a figure which would be less than $54,000—or put it this way: a figure between $54,220.24 and zero, would it? A. Yes, sir.

Q. Now, Mr. Andrews, is it your testimony then in giving [2222] us this figure of $54,220.24 that this man, Mr. Chan, actually paid too much income in that amount to the United States Government; is that your testimony?

A. That he paid too much income tax or do you mean that he reported too much?

Q. That he reported too much, rather.

A. On the basis of the testimony and evidence introduced I must arrive at the figure of $54,220.24 over-reported.

Q. In other words, this calculation you have made is arrived at on the basis purely on the evidence in the case, is that correct?

A. That's right.

Mr. Sullivan: No further questions.

Cross-Examination

By Mr. Fleming:

Q. Mr. Andrews, at the last trial you arrived at a figure of $80,000 over-reported income, did you not?

A. That figure of $80,000 was calculated on a different basis.

(Testimony of Frank T. Andrews.)

Q. I see.

A. At that time in those statements——

Q. Well, you first answer the question.

Mr. Sullivan: I submit that the witness should be permitted to answer the question, your Honor. He was in the process of explaining it. [2223]

The Court: You may do so.

A. (Continuing): At that time the statements were calculated that is, the net worth statements were calculated on the basis of assets belonging to the Chin family, and the adjusted increase in net worth or income on a net worth basis was compared with the income of the Chin family. In making that calculation it came out to an indicated over-reported income, I believe, of around $80,000.

Q. Now, you are making a calculation at this time on a different basis? A. Yes, I am.

Q. Now, the figures you have given us, are those based on your professional opinion as an accountant?

A. I am a professional accountant, and I would say that the figures that I have set down are set down in a professional manner. Some of the figures I have set down of my own volition; some of them where they involved matters on which an accountant must rely on an attorney, which happens in many cases, in our ordinary practice of accountancy, I have had to do that here.

Q. Well, are these defense contentions or your own opinion as an accountant, the figures you have given us?

(Testimony of Frank T. Andrews.)

A. I have just explained that.

Q. Will you answer the question, please?

A. In some instances, I put down the figures as matters [2224] of accountancy which I could put down myself. In other cases I have had to obtain the direction of Mr. Sullivan.

Q. I take it then in some cases you put down figures which you were told to do by Mr. Sullivan?

A. Well, we discussed all of these figures and in some instances where there was a legal question involved I put them down at his direction.

Q. And in some cases you undertook to weigh and analyze the evidence yourself, is that correct?

A. Well, let me put it this way: in some cases I didn't have to do any weighing, the figures were there and I put them down.

Q. And you were the one who made that determination? A. I put them down.

Q. You made the determination yourself without any assistance from Mr. Sullivan as to some of these figures, is that it?

A. Yes, that is right.

Q. And in doing so you were expressing your professional opinion?

A. I don't agree with that at all.

Q. What were you doing?

A. I put them down because they were in the evidence; I didn't have to express any opinion.

Q. You were the one who chose those figures, were you not, chose to put them down? [2225]

A. No, in most case you chose the figures, you

(Testimony of Frank T. Andrews.)

were the one that brought them out during the trial, not me.

Q. You didn't put down all the Government's figures, did you?

A. All of the Government's figures?

Q. Yes.

A. You mean all the figures that are on the Government's balance sheet?

Q. Yes.

A. No, I think that that balance sheet is wrong.

Q. My question is you didn't put them all down and in not putting them all down you then made a selection, did you not?

A. Because I did not put all the Government's figures down I made a selection? I wouldn't say so.

Q. Who made the selection, Mr. Sullivan?

A. Well, no, let us not become confused. I put down what I thought should be put down.

Q. And in that you were expressing your professional opinion?

A. No, I just told you that I didn't think I was doing that, I was just putting down what was in evidence.

Q. You put down what you determined was the important parts of the evidence, is that it?

A. No, I put down all the figures that I found in evidence that pertained to Mr. Chin Lim Mow and his wife and their net worth. [2226]

Q. Who made that determination as to whether these figures pertained to Chin Lim Mow and his wife?

(Testimony of Frank T. Andrews.)

A. Who made that? Those are taken from the evidence, and as I say, in some instances, under the direction of Mr. Sullivan.

Q. Did you make the determination in the other instances? A. Most cases I did, yes.

Q. So that at least partially these figures then represent your determination of what were the relevant figures in the case?

A. I put down the figures that were developed during the course of the trial that pertained to the net worth of Chin Lim Mow.

Q. Now, in putting down some of these figures and not others, you then exercised your judgment as to what figures should be put down, did you not?

A. Well, I think that would be necessary.

Q. So that at least to that extent the documents which you have presented reflect your judgment?

A. No, only in this way: that there were certain figures that I put down at the direction of Mr. Sullivan. The rest of the figures that I put down were the figures that I found in the evidence. I didn't have to exercise much judgment in putting them down.

Q. You had to exercise some, didn't you, Mr. Andrews? [2227]

A. Yes, that is right, and I did.

Q. And you were the one that exercised that?

A. I was the one.

Q. And are you employed by the defendant Chin Lim Mow? A. Yes, I am.

(Testimony of Frank T. Andrews.)

Q. And did you, were you employed by him at the first trial? A Yes.

Q. And you were paid a fee for your services?

A. I was.

Q. So at least to the extent of that your opinion was influenced by the fact of your employment?

A. I think that that's silly.

Q. What is that answer?

A. I say, I think that is silly. That my opinion was influenced because I received a fee for compiling figures? No.

Q. Is it your testimony that the fact that you received a fee had no influence whatsoever on your actions? A. None whatsoever.

Q. Very well. Now, in arriving at the calculation and exercising your opinion and receiving—and in some cases receiving the directions of Mr. Sullivan in other cases, you were forced to make certain assumptions, were you not, with respect to the evidence?

A. I was—yes, I was forced to assume that some of the [2228] figures——

Q. I didn't ask you what assumptions, I asked you if you were forced to make any assumptions.

A. Yes, I was.

Q. Will you answer that?

A. Well, for example, the Government calculated depreciation on these buildings that the defendant owned, and for the purposes of these statements I have assumed that the rates of depreciation that were taken were adequate.

(Testimony of Frank T. Andrews.)

Q. You assume that the bonus checks in the Wai Yuen Club were proper payments?

A. Indeed I did.

Q. You assumed that the liabilities were proper and true liabilities?

A. That is the evidence in this case.

Q. I didn't ask you about the evidence, I asked you whether you assumed that, Mr. Andrews. Will you answer the question?

A. I assumed it from the evidence.

Q. Your answer is you did assume those were proper liabilities? A. Yes, indeed.

Q. Did you assume there was a proper liability of $11,000 to Chan Bat at the end of 1945?

A. I did.

Q. And did you assume that other liabilities to the so-called Wai Yuen employees as shown in that balance sheet? [2229]

A. I assumed that from the evidence.

Q. Did you assume the $220,000 in cash on hand as indicated by the same exhibit?

A. I did not.

Q. You assumed that there was not?

A. I didn't assume that, that is the testimony.

Q. I am asking you what you assumed, asking you if you assumed that $220,000 cash on hand?

A. I didn't have to assume that, the testimony says it is wrong.

Q. I didn't ask you that, I am asking you what you did, did you assume that?

(Testimony of Frank T. Andrews.)

A. I make no assumption——

Mr. Sullivan: I submit, your Honor, the witness has answered.

Q. (By Mr. Fleming): You assumed it was not?

The Court: He has answered it.

Q. (By Mr. Fleming): Did you assume that there was no Wai Yuen bank roll at the end of the year 1945?

A. There was no evidence on that.

Q. I am asking you if you assumed there was no bank roll at the end of '45 in making these calculations?

A. I have no alternative when there is nothing in the record, I can't——

Q. Is it your answer you did or you did not assume there [2230] was no bank roll?

A. I made no assumption at all.

Q. Included in that amount for bank roll at the end of 1945? A. No.

Q. Did you examine the defendant's tax return for the year 1946 and observe that he reported an income of $30,447.83 as income from the Wai Yuen during the year 1946, did you make that examination? A. Yes.

Q. Did you examine the defendant's 1947 tax return indicating an income from the same source for that year of $25,544.55? A. No.

Q. You did not examine that return. Were you aware of that? A. No, I was not.

Q. That he had reported that sum?

(Testimony of Frank T. Andrews.)

A. No.

Q. Now, did you also assume the validity of the Admay so-called partnership in making your calculations? A. Yes.

Q. Did you assume the validity of the other partnerships tax returns which have appeared in evidence as being valid partnerships?

A. Yes, indeed.

Q. And in making your calculations they were based on such [2231] assumptions? A. Yes.

Q. You eliminated the $100,000, Evelyn Lee Chang account, you did not include that in any of your calculations, did you?

A. I didn't eliminate anything, I didn't include.

Q. And was that the determination which you made or Mr. Sullivan?

A. Well, Mr. Sullivan and I discussed it at considerable length and—let me put it this way: If you came to me at my office and presented all the evidence that has been presented here in regard to those accounts with Chang trustees and told me that you wanted me to prepare a balance for Chin Lim Mow and include those items in his balance sheet, I should have to refuse you.

Mr. Fleming: Will you read the question, please?

(Question read by the Reporter.)

A. Mr. Sullivan directed me to put it in.

Q. (By Mr. Fleming): Now, you also included

(Testimony of Frank T. Andrews.)

these twenty bank accounts, bank of Canton, did you not? A. Yes.

Q. And was that a determination that you made or one which you were directed by Mr. Sullivan?

A. I was directed to do that.

Q. You also included the sum of some $58,000 cash on hand at the beginning of the year 1945, did you not? [2232] A. Yes.

Q. And at the end of the year you included no cash on hand? A. That's right.

Q. Now, is that your opinion in arriving at that figure, or Mr. Sullivan's direction?

A. No, I think that I did that.

Q. Now, you included cash on hand, for example, the sum of $25,000 which was a currency deposit on January 24, 1945, did you not?

A. Yes, I did.

Q. Is that proper accounting practice to include that figure as cash on hand as of December 31, 1944?

A. Yes, I think that that is perfectly proper under the circumstances, and of course in order to determine whether or not it is proper we have to hear the circumstances.

Q. Did you make that determination——

Mr. Sullivan: Pardon me, just a moment, please. I suggest the witness isn't finished yet. May I ask the witness if he has finished?

The Witness: I am not finished.

Mr. Fleming: I submit Mr. Sullivan shouldn't coach the witness.

(Testimony of Frank T. Andrews.)

Mr. Sullivan: I object to that, if your Honor please, and I assign that remark as misconduct.

The Court: We are not having any colloquies. Have you [2233] finished your answer?

Mr. Sullivan: Your Honor, may I ask that that assignment be made?

The Court: The assignment will not be made.

Mr. Fleming: Will you read the question?

(Question read by the Reporter.)

Mr. Sullivan: Pardon me, Mr. Witness. May I have that portion of the answer that the witness gave?

The Court: Will you read it, Mr. Reporter?

(Answer read by the Reporter.)

The Court: Had you completed your answer?

The Witness: No, sir.

The Court: All right.

The Witness (Continuing): In starting, I would like to first give a simple illustration before I go into the facts in this case. For example, let's say that a person finds in his wallet $10 on January the 15th of some year, and this person is a working person. He has not yet received his pay check for January the 15th, or cashed it. He has no other income except his salary, and if no one gave him the $10, I would say that it is logical that he had the $10 on December 31, of the preceding year. [2234]

Now, in this case, it appears to me that this money that we are talking about, this $58,000 in

(Testimony of Frank T. Andrews.)

currency that was expended by Mr. Chan between January 1st and January 24th, of 1945, did not come from any of Chan's bank accounts.

Q. Is that your assumption?

A. Well, I looked at them and I couldn't see where it did.

Secondly, I can find no evidence in this trial of any money borrowed by him in that period which he could have had in currency.

Third, there is no evidence that he withdrew any currency from any partnership that he was in during that period of time. I am speaking now between January 1st and January 24th, 1945. The proceeds of real estate rentals were either deposited by Mr. Chan or used by realtors for making payments on principal and interest on mortgages.

Now, the gross daily receipts in the Wai Yuen Gambling Club for the month of January amounted to less than was deposited in the Wai Yuen Bank account in the month of January, so it appears to me he didn't get it out of the Wai Yuen.

Next, my statement of income on a net worth basis does not disclose there was unreported income. So when we take all these circumstances into account, there is no place that this money could have come from except from funds that he had on hand at December 31, 1944, and that is the reason I have placed this sum as having been on hand at December 31st, 1944, in his [2235] net worth statement.

Q. Are you the one that made that assumption, Mr. Witness? A. Yes, I did.

(Testimony of Frank T. Andrews.)

Q. At the last trial you said they were directions of Mr. Sullivan, did you not?

A. Yes, I believe I might have said that I discussed it with him and did it under his direction. All of these matters were discussed with Mr. Sullivan. I have placed nothing in these statements that I have not discussed with him, and he has concurred with my viewpoint and directed me to place them in the statements.

Q. So that actually the figures represent defense contentions?

A. Why, I don't—what figures do you refer to?

Q. The figures you have identified in the two charts, DE and the other chart.

A. They are only contentions to the extent that you might not agree with them.

Q. Is it the defense position that the defendant's net worth as of January 31, 1944, was $829,-370.53?

A. No, I would say that that is the result of compiling the figures, most of which you have brought out yourself here in court.

Q. You have undertaken to analyze these figures in accordance with your own judgment, have you not?

A. To analyze the figures? I don't believe I analyzed [2236] anything.

Q. You have undertaken to determine the figure you should put down and the figures you should not put down? A. Yes, in many cases I have.

(Testimony of Frank T. Andrews.)

Q. So when you put down a figure of net worth as of December 31st, 1944, $829,370.53, does the defense accept that as the figure of Chin Lim Mow's net worth as of that date?

A. That is the way the evidence shows it.

Q. Now, I will direct your attention to the—I will ask you if you put anything down for cash on hand at the end of the year?

A. No, I have not.

Q. So that that one item would result in a reduction of some $58,000 in the net worth, according to your calculations, would it not?

A. Yes, it would.

Q. Did you put down any part of the Evelyn Lee Chang $100,000?

A. No, and I will be glad to tell you why.

Q. My question was, did you put down any of that part, any of the $100,000?

A. That belonged to the Evelyn Lee Chang trustee account? No.

Q. 1945, then, you put down "zero cash on hand," that is correct, is it not?

A. That is because you adduced no testimony in that regard.

Q. My question is not why you did it, but what you did. [2237]

A. I only can do what is in the evidence.

Q. My question is, what did you put down for cash on hand as of 1945? What did you put down?

A. Nothing.

Q. Zero? A. Nothing.

(Testimony of Frank T. Andrews.)

Q. And to that extent, then, you exercised your own independent determination when you say you found nothing?

A. No. I showed what you put into the evidence.

Q. And you concluded "Cash on hand, zero"?

A. What else could I do?

Q. I am not asking you what else you could do, I am asking you what you did.

A. I found none, so there is none there.

Q. Very well. Now, $100,000, Evelyn Lee Chang, I believe you stated you did not put down any of that? A. That is true.

Q. Now, Wai Yuen bank roll—will you tell me, first, what figure the government put down for the Wai Yuen gambling bank roll at the beginning and end of 1945?

A. I don't know. I haven't the statement.

Q. Did you examine that statement?

A. I think it was $50,000, as I remember it.

Q. Well, you are able to tell me, aren't you?

A. Yes, sir, I think it is $50,000, for, I don't know, some [2238] seven or eight organizations.

Q. $50,000 at the beginning and end——

Mr. Sullivan: Just a minute. If your Honor please, I object to counsel interrupting the witness, and a great deal of the importance of the answer is being lost. May I have the answer read?

The Court: Yes, you may have the answer read.

Mr. Fleming: Can I have the question read?

Q. I asked you, what figure did you put down?

(Testimony of Frank T. Andrews.)

Mr. Sullivan: I want the answer which the witness gave.

The Court: Read both the question and answer, Mr. Reporter.

(Question and answer read by the Reporter.)

Mr. Sullivan: I submit the question has been asked and answered.

Q. (By Mr. Fleming): What figure——

The Court: Have you finished your answer after you used the word "organization"?

A. Yes, sir.

Q. (By Mr. Fleming): Did you include any part of that $50,000 in making your balance sheet as of December 31, 1945?

A. Any part of what $50,000?

Q. $50,000 bank roll you have just testified was the figure used by the government in its calculations. Did you include any part of that in your calculation? A. Yes, I did. [2239]

Q. How much? A. $47,259.40.

Q. My question related to the end of 1945, and I will ask you how much you included.

A. No evidence.

Q. Well, I didn't ask you about evidence. I am asking you how much you included, Mr. Witness.

A. I can't include anything that is not in the evidence.

Q. How much did you include in that 1945?

A. There was nothing.

Q. How much did you include?

(Testimony of Frank T. Andrews.)

A. Nothing.

Q. Nothing? Now, you did, however, include $47,259.40 at the beginning of 1945, did you not?

A. Yes, sir.

Q. That was the figure you have testified was comparable to the $50,000 used in the government's calculations?

A. Well, I said it was comparable in a way.

Q. In a way? Now, what figure did you include for the defendant's investment in the account 20 at the end of 1945?

A. I used $238,278.81, plus his interest in $80,-825.70.

Q. And well, what is the total?

A. Well, I would have to calculate it.

Q. Two hundred and fifty thousand, roughly?

A. Yes. [2240]

Q. What figure did you use at the first trial for the defendant's interest in account 20, Gerdon Land Company? A. It wasn't calculated.

Q. What? A. It wasn't calculated.

Q. I said, what figure did you use?

A. It was not calculated.

Q. Is it your answer, then, you didn't use any figure for the defendant's interest in account 20?

A. I explained that at the first trial we used a different method.

Q. I am asking you not to explain, but what you did at the first trial. What figure did you include under the heading of "Chin Lim Mow" for his in-

(Testimony of Frank T. Andrews.)

terest in Gerdon Land Company under account 20? Can you tell me that?

A. I already answered that.

Q. Well, what did you include?

A. For Chin Lim Mow and the family I included three hundred——

Q. (Interposing): I am asking you Chin Lim Mow, account 20, Gerdon Land Company, what figure did you include at the first trial as of December 31, 1945? A. I didn't calculate it.

Q. Well, do you have—do recall identifying an exhibit CF at that trial, a document Mr. Chin Lim Mow's net worth statement as of December 31, 1944, and December 31st, 1945? [2241]

A. I do not.

Q. Do you have a copy of that?

A. Yes, I have.

Q. Do you have it in front of you?

A. Yes, I have.

Q. Tell me what figure you included under the heading "Chin Lim Mow, Gerdon Land Company, account 20"?

A. I didn't calculate his interest. I calculated the interest of the family.

Q. I am not asking you what you calculated. I am asking you what figure you included?

Mr. Sullivan: If your Honor please, I submit that question has been asked and answered at least three times.

Mr. Fleming: I submit it has not been an-

(Testimony of Frank T. Andrews.)

swered. The witness is doing everything else but answering it.

The Court: If I am to accept that remark as an objection, it will be overruled.

A. The statement I prepared at the first trial——

Mr. Fleming (Interposing): I am asking you what figure——

Mr. Sullivan: If your Honor please, I object to counsel interrupting the witness.

The Court: Well——

Mr. Fleming: I submit he can answer the question and explain it if he wishes. [2242]

The Court: Answer the question, Mr. Witness.

A. I can't, your Honor.

Q. (By Mr. Fleming): Well, let me ask you this: do you find this as headed "Chin Lim Mow, net worth statement, December 31st," do you find an item 2 listed, account 20, Gerdon Land Company, which has the figure "1945, defense, $301,568.83"? Do you find that figure? A. Yes, I do.

Q. That was the exhibit you identified at the first trial? A. It was.

Q. What is the figure which you have included in this computation?

A. Well, as we just estimated here, around $250,000.

Q. And what is the difference between those two figures? $50,000, roughly?

A. Yes. The family interest.

(Testimony of Frank T. Andrews.)

Q. Now, I will ask you, going back then to the Wai Yuen Club, I will ask you what value you included for the Wai Yuen Club as of December 31st, 1945?

A. That is indicated on page 2 of schedule 2, and it shows a negative net worth, $15,561.61.

Q. You have the Wai Yuen Club fifteen thousand and some odd dollars in the hole, is that it?

A. It would give that appearance.

Q. The government showed it as of what, do you recall? Do [2243] you recall what Mr. Brady showed that value of the Wai Yuen Club as of that day? A. His statement is wrong.

Q. I didn't ask you that. I asked you, do you recall what figure he included? A. No, I don't.

Q. I will show you a copy of exhibits 339 and 342, and ask you if you will keep them in front of you so you can refer to them. Will you tell me, then, the figure included by Mr. Brady at the end of 1945 for the Wai Yuen Club?

A. Well, you can't tell.

Q. What figure do you see in exhibit 339?

A. You see, he has included Wai Yuen Company in two different places.

Q. Well, my question is, what figure do you find on exhibit 339, 1945?

A. Well, in the first place, you've got "Bankroll, cash of above clubs," which includes Wai Yuen, of $50,000.

Mr. Fleming: Will you read the question, please, Mr. Reporter?

(Testimony of Frank T. Andrews.)

Mr. Sullivan: If your Honor please, I object to this very respectfully. The witness is trying to answer the question. He said he finds money in two places, and when counsel doesn't find the answer coming out the way he wants it, he interrupts.

The Court: The answer is not responsive. Read the question, [2244] Mr. Reporter.

(Thereupon the reporter read: "Well, my question is, what figure do you find on exhibit 339, 1945?")

Q. (By Mr. Fleming): Listed for the Wai Yuen Club?

A. Yes, I see two figures. First, $37,658.19, and some portion of $50,000.

Q. That is this fifty thousand we have just been talking about, isn't it? A. Yes.

Q. Now, what figure did you put down under "Wai Yuen Club, end 1945"?

A. My statement is divided into two parts, too. My statement includes as assets $37,658.19, and as liabilities——

Mr. Fleming (Interposing): Now, Mr. Witness, I am asking you about the end of 1945; I am not asking you about 1944.

Mr. Sullivan: I submit that is what he is giving you.

Mr. Fleming: No, he is giving me the figure for 1944.

The Witness: No, I am not.

(Testimony of Frank T. Andrews.)

Mr. Sullivan: If counsel will look at the exhibit, he will see he is reading the 1945 figure.

Q. (By Mr. Fleming): What figure did you put, then?

A. I put down assets, $37,658.19, and liabilities an aggregate $53,219.80.

Q. Well, will you tell me what figure you put down in the net worth statement for value of the Wai Yuen Club at the end of [2245] 1944?

A. Negative net worth, $15,561.61.

Q. That is roughly a difference of $50,000 from Mr. Brady's figure, is it not?

A. I don't know.

Q. Well, the difference between a negative fifteen and a positive thirty-seven is at least fifty, is it not?

A. That is not what Mr. Brady has for the Wai Yuen Club. He has some cash, I don't know how much.

Q. Can you tell me the difference between those two figures? A. Between which?

Q. Figure you had under "Wai Yuen" and the figure Mr. Brady had under "Wai Yuen."

A. I don't know what figure he has for cash.

Q. You can't tell me the difference between those two figures on the charts?

A. I can show you what he has under the heading "Wai Yuen."

Q. All right, he has what he has under the heading, and the difference is roughly $50,000, is it not? A. That is correct.

(Testimony of Frank T. Andrews.)

Q. Very well. What figure did you put down for the value of the Elite, Chin Lim Mow's interest in the Elite as of December 31st, 1944?

A. Well, that is in two places. First, he had an interest of $20,100 at the end of 1944 and a sixth interest in $27,330. [2246]

Q. Twenty-five thousand, roughly?

A. I would say so.

Q. What figure did you put down when you testified at the last trial for the defendant's interest in the Elite Company?

A. I didn't calculate it that way. I calculated it on a family basis.

Q. My question is, what value did you put down? Directing your attention to item 18 on the document headed "Chin Lim Mow, net worth statement as of December 31st," I will ask you what figure you put down.

A. In this statement the figure is $43,800.

Q. My question is directed to December 31st, 1944. A. $58,230.

Q. Now, what figure did you put down for the defendant's interest in the Elite as of December 31st, 1945, in your chart exhibit DD in this trial?

A. $15,000 direct ownership, and an interest in $11,400.

Q. Roughly, $17,000?

A. I would say so.

Q. And what figure did you put down for the defendant's interest in the Elite when you testified at the last trial as of December 31, 1945?

(Testimony of Frank T. Andrews.)

A. On a family basis I put down $43,800.

Q. Do you find the words "family basis" on that chart?

A. That is the way it was computed. [2247]

Q. Now, I will ask you—let's see, I believe you said that these Wai Yuen loans, you accepted the validity of those loans, did you, as shown on exhibit 186?

A. I accepted them as shown in the evidence.

Q. That is the $11,000 loan to Chan Bat as shown on exhibit 186?

A. My recollection is that it was.

Q. And the $9,000 as shown to Yee Shew Lung?

A. If that is what it was, why, it is in there.

Q. And the $7,000 as shown on Chew Dit Tzse?

A. Yes.

Q. And the $7,000 as shown on Woon Lee, Share Shew Wong and Share Shu Dit, you accepted all of those? A. Yes, sir.

Q. And you accepted the so-called bonus checks as valid obligations and payments?

A. They were——

Q. (Interposing): Is that one of your assumptions?

A. No, that is no assumption of mine. They were receipts and they were properly endorsed.

Q. It is on that basis you put it down?

A. That is the evidence.

Q. You thought those were proper, bona fide transactions, and accordingly you put them in?

A. That is correct. [2248]

(Testimony of Frank T. Andrews.)

Q. What figure did you put down for Wai Lee Liquor as of December 31, 1944? A. $1,333.40.

Q. And what did you put down at the last trial?

A. On a family basis, $5,641.56.

Q. You also put down Chan Bow Kay as an asset, did you not, beginning 1945? A. Yes.

Q. And you did that on the testimony—whose testimony?

A. On Chan Dit Chow, and at the direction, I believe, of Mr. Sullivan.

Q. And you eliminate that at the end of the year? A. It was paid in 1945.

Q. Did you include that as cash on hand at the end of the year? A. Cash on hand?

Mr. Fleming: Will you read the question?

A. No evidence on that. I didn't include it.

Q. (By Mr. Fleming): Did you include any cash on hand at the end of the year?

A. No. No evidence.

Q. Your answer is no, you did not?

A. No, I did not.

Mr. Fleming: No further questions.

The Court: We will take the afternoon recess at this time, [2249] counsel, if you have no objection.

Mr. Sullivan: None whatsoever, your Honor.

The Court: Take a recess for a few minutes, ladies and gentlemen.

(Short recess.) [2249A]

(Testimony of Frank T. Andrews.)

Mr. Sullivan: May I proceed?
The Court: Proceed.

Redirect Examination

By Mr. Sullivan:

Q. Just one or two questions, Mr. Andrews, please.

Counsel for the Government had you read from your present calculations which are introduced in this case and which are Exhibits DD, and DE, a number of figures and then made reference to calculations that you made at the first trial of this case. Do you recall that testimony? A. Yes.

A. Yes.

Q. Just now. And I noticed that in many of your answers you responded by saying that the figure was such and such on a family basis. Do you recall that? A. Yes.

Q. Now, in making the comparable chart, Mr. Andrews, for your testimony in the first trial of this case, was there a different method employed than you employed at this trial?

A. Yes, it was.

Q. Now, can you tell us whether or not in the first trial of the case you included all the assets so far as the evidence disclosed and upon my instructions which were not only the assets of Mr. Chan and his wife but of members of the family?

A. I did.

Q. Now, when you had made calculations of the net worth [2250] based upon the inclusion of those

(Testimony of Frank T. Andrews.)

assets as you say on a family basis, did you then reconcile your taxable net income figure with reported income?

A. With reported income on the returns of the various members of the family.

Q. In other words, in the first trial you took the whole family and you reconciled that net worth with the reported income of all of the family's returns which are in evidence, is that correct?

A. Yes.

Q. Now, did you adopt a different method in making this analysis which you have presented here today?

A. I did because you asked me to exclude the identifiable interests of others than Mr. Chan and his wife.

Q. When you excluded the identifiable interests of the other members of the family did you then compare the resulting figure of taxable net income on a net worth basis with the reported income of the whole family or with the reported income of just Mr. and Mrs. Chan?

A. Just Mr. and Mrs. Chan.

Q. Have you then maintained a consistency in your treatment of the assets and of the income which was produced by the assets in the first trial and a consistency in the second trial?

A. Yes, sir. [2251]

Q. Now, is that what you accountants call conforming the accountancy to the tax practice?

A. It is.

Mr. Sullivan: No further questions.

(Testimony of Frank T. Andrews.)

Mr. Fleming: No questions, your Honor.

The Court: You may be excused.

(Witness excused.)

Mr. Sullivan: Your Honor please, there are just a few exhibits which I would ask leave to address your Honor on now. I offer in evidence Exhibit BS for identification, which would be the worksheets that Mr. Wilkinson testified from.

The Court: They may be admitted.

The Clerk: Defendant's Exhibit BS in evidence.

(Thereupon document previously marked Defendant's Exhibit BS for identification was received in evidence.)

Mr. Sullivan: Exhibit CZ, if your Honor please, I don't find that I had that introduced in evidence, although I had companion exhibits introduced, which were CW, CX and CY. I now offer in evidence Exhibit CZ, which was a sheet of Hogan and Vest rental statements that were used during the cross-examination of the testimony of the witness Wallace.

The Court: They may be received.

The Clerk: Defendant's Exhibit CZ in evidence.

(Thereupon document identified above was received in [2252] evidence and marked Defendant's Exhibit CZ.)

Mr. Sullivan: And a similar statement, which is the statement of Hogan and Vest dated July 12,

1944, Exhibit DA for identification. I now offer it in evidence.

The Court: It may be received.

The Clerk: Defendant's Exhibit DA in evidence.

(Thereupon document previously marked Defendant's Exhibit DA for identification was received in evidence.)

Mr. Sullivan: I offer in Evidence Exhibit DC-2, which was a schedule of summary of income reported by other members of the family which was identified during the course of the cross-examination, testimony of Mr. Brady, and which according to my recollection and in its original preparation prepared upon the information developed from income tax returns in the record.

Mr. Fleming: Was that introduced in the first trial?

Mr. Sullivan: It was.

Mr. Fleming: I have no objection.

The Court: It may be received.

The Clerk: Defendant's Exhibit DC-2 in evidence.

(Thereupon the document identified was received in evidence and marked Defendant's Exhibit DC-2.)

Mr. Sullivan: Defense rests, your Honor.

Mr. Fleming: Government rests, your honor.

Mr. Sullivan: I have certain preliminary motions I [2253] would like to renew, if your Honor please, after your Honor has entertained any sug-

gestion as to the future order of procedure, some of which your Honor has indicated. May I do that if your Honor plans to dismiss the Jury, may I do that after their dismissal?

The Court: Now, ladies and gentlemen, as I have heretofore indicated, I am required to be out of town tomorrow and Wednesday, returning here Wednesday evening. Thursday morning we will proceed with the arguments in the case and the instructions of the Court.

Now, this has been a long case, thirty-four witnesses have taken the stand here and there are voluminous exhibits. It is a case of extreme importance to the Government of equally extreme importance to the defendant. So therefore in discharging you this afternoon I again want to emphasize and to reiterate with all the fervor that I can muster, you are not to discuss this case among yourselves or with anyone else or are you to form or express any opinion about it until it is finally submitted to you.

By the same token I want to indicate to you you are not to indicate by any gesture or movement however slight what your feelings may or may not be in the trial of this case. You will have plenty of time to express your feelings and thoughts in the matter when you have heard the arguments of counsel and the instructions of the Court. [2254]

I want to impress that upon you, the serious character of this case, and congratulate you all upon the serious manner in which you have ap-

proached it, and I urge to continue that attitude until the case is finally submitted to you.

You will now be discharged until Thursday morning at 9:30—Thursday morning at 9:30.

Mr. Sullivan: Pardon me, your Honor. Would it be permissible to ask if your Honor plans to run through until 4:30 Thursday afternoon with the end in view, if it can be accomplished, of getting rid of all of the arguments on both sides?

The Court: Yes, I want to discuss that with you in chambers after the Jury is discharged, but you will plan on running from 9:30 to 4:30 on Thursday.

You may now leave, ladies and gentlemen.

(Whereupon the Jury leaves the courtroom.)

Mr. Fleming: May it please the Court, I have one supplemental instruction prompted by an incident the other day which I would like to submit at this time. The Government's request for instructions, the last number——

The Court: While on that subject matter, gentlemen, I intend to give substantially the same instructions as given by Judge Harris, supplemented, however, by my own stock instructions, so you may have that in mind in preparing your argument. If there are any particular instruction [2255] which you wish to take up we can do that at a later time.

Mr. Sullivan: Yes, your Honor.

At this time, your Honor, we respectfully request leave to submit to your Honor additional requested instructions of the defendant which I have num-

bered 56 through 62. I will hand counsel a copy. Mr. Clerk, will you give this to His Honor?

And I might say to your Honor that some of the instructions included in there are instructions which were not submitted at the last trial of the case, some are.

I have one additional instruction, your Honor, which we are working on which we may or may not submit to your Honor. I was hopeful that your Honor would permit us to submit it on Thursday morning. I found through forgetfulness my secretary follows the observance of holidays in the state courts rather than in the federal courts.

The Court: You may submit it on Thursday.

Mr. Sullivan: Now, may I make the motions, your Honor?

The Court: Yes.

Mr. Sullivan: At this time, if your Honor please, at the conclusion of the case, I respectfully move to strike certain evidence, both oral and documentary, which has been introduced by the Government. And may I be permitted to make the motion in this fashion: that I repeat and reiterate the motion to strike evidence which I filed with your [2256] Honor at the conclusion of the prosecution's case, and I repeat and reiterate the motion which I made orally in connection with one aspect of the testimony without repeating the same and all the details or reiterating the grounds.

The Court: You may do so.

Mr. Sullivan: May that be considered made, your Honor?

The Court: Yes.

Mr. Sullivan: At the conclusion of the entire case, if your Honor please, the defendant in the above-entitled action, Chin Lim Mow, respectfully moves the above-entitled Court for an order dismissing the charge contained in the first count and the charge contained in the second count of the indictment in the above-entitled action and for a judgment of acquittal upon each of the grounds that I have specifically made to your Honor in the motion for judgment of acquittal made at the conclusion of the Government's case, and in respect to each of the specifications of the motions both for the first count and for the second count, which I made at the conclusion of the prosecution case, so as not to burden the record, if your Honor please, may I be permitted make the motion in that fashion without the necessity of reiterating the specifications or the grounds, but with the understanding that I have repeated them by considering the motion as having been repeated in toto the second time at the conclusion of the entire case? [2257]

The Court: That will be the order.

Mr. Sullivan: Thank you, your Honor.

The Court: Your motions will be denied.

Mr. Sullivan: May an exception be noted on the record, your Honor, with respect to your Honor's denying the motion to strike, both made by the filing of a written notice and the oral application?

The Court: I understand you don't need to note an exception, but, however, in the interests of protecting your record it may be made.

Mr. Sullivan: And also to your Honor's order denying the motion for judgment of acquittal made at the conclusion of the entire case.

The Court: Very well.

Mr. Sullivan: Thank you, your Honor.

The Court: May I see you gentlemen in chambers for a minute?

(Thereupon an adjournment was taken to the hour of 9:30 o'clock a.m. Thursday, October 16, 1952.)

Certificate of Reporter

(We,) Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 2258 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ JOSEPH J. SWEENEY,

/s/ KENNETH J. PECK,
/s/ RUSSELL D. NORTON.

Friday, October 17, 1952, at 9:30 A.M.

COURT'S INSTRUCTIONS TO THE JURY

The Court: May it be stipulated, counsel, that the jurors are present?

Mr. Fleming: Yes, your Honor.

Mr. Sullivan: Yes, your Honor.

The Court: May it be further understood that the rule which regards to instructions has been complied with?

Mr. Sullivan: Yes, your Honor, except that at this time, if your Honor please, the defense wishes to apprise the Court of its intentions to take certain proceedings under Rule 30 after your Honor has instructed.

The Court: You will be given that opportunity.

Mr. Sullivan: Thank you, your Honor.

The Court: Ladies and gentlemen of the jury, at this time it becomes your solemn duty to assume one of the most important functions of citizenship. This case has been a long and arduous one, as I have previously indicated upon numerous occasions. The attention which you have given to it has been extremely commendable. I don't know of any jury in my experience that paid closer attention to the evidence and has regarded its duties with more fervor than you have, and I commend you for it.

It now becomes the duty of this court to give the instructions to you upon questions of law which should govern you in reaching your decision in this very important case.

You members of the jury are the exclusive judges of all questions of fact which have been presented for you during the course of this long trial. You are also the sole judges of the weight of the evidence and the credibility of the witnesses. But as to the principles of law that are involved, you must, in

obedience to your oath, be governed by the instructions which I am about to give you.

At the very outset I charge you that you must not consider for any purpose any testimony or evidence which has by order of the Court been stricken from the record. Such testimony or evidence should be treated by you as though you had never heard nor seen it.

Now, you will distinctly understand that in this charge which I am about to give you the Court is in no manner or form expressing, nor does it desire to express any opinion upon the weight of the evidence or any part thereof; nor does the Court express any opinion as to the truth or falsity of the testimony of any witness.

I might say in passing that it is my province if I choose to do so to comment upon the evidence, leaving to you, of course, the ultimate decision. But I do not choose to exercise that privilege. So you will distinctly understand [2*] that I am not in any manner or form expressing any opinion that any alleged fact in this case is or is not proven. With the questions of fact, the weight of the evidence, the credit that you should give to any witnesses sworn in the case, the Court has nothing to do. In other words, I do not express any opinion upon them. These are matters which are entirely within your province and which you, as jurors under your oaths, must determine for yourselves.

My duty is simply to announce to you which general principles of law apply to this case, based upon the testimony that you have heard, in as a

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

concise a manner as is consistent with my duties and with the importance of the issues which are involved here.

So, therefore, if in stating any proposition of law to you I have assumed or I will have assumed any fact as proven, you are to disregard any such assumption and draw your own conclusions from the evidence. That is to say, again, that you and you alone are exclusive judges of the facts in this case. So therefore, if I as the Judge of this Court have at any time during this trial used any language, or if I have seemed to you to indicate the opinion of the Judge as to any question of fact or as to the credibility of any witness, you must not be influenced thereby, but you must determine for yourselves all questions of fact without regard to the opinion of anyone else. [3]

I charge you that you are not to use in the consideration or determination of any facts in this case any reference to or comment by Court which I may have made during the course of this case in connection with the admission of testimony or otherwise. The determination of the facts of this case is solely within your province, and you are not to be assisted or influenced in any way by anything which the Court may have said or done in that behalf, except as to matters of law which are applicable thereto.

It has been your duty to listen patiently which you have done, to all of the evidence in this case and to the arguments of counsel. Now, while it was

your duty to listen to and to consider the arguments of counsel, I instruct you that the arguments of counsel are not evidence, and that the only legitimate purpose of argument is to assist you in arriving at a proper verdict from the evidence in the case, applying to such evidence the law as given you by the Court.

The defendant in this case is accused by the Grand Jury for this district as follows, and in order that the indictment may be familiar to your minds I shall read it. It is very brief:

"That on or about the 15th day of March, 1946, in the Northern District of California, Southern Division, Chin Lim Mow, late of Oakland, California, did wilfully and knowingly attempt to defeat and evade a large part of the income tax [4] due and owing by him to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent income tax return wherein he stated that his net income for that calendar year, computed on the community-property basis, was the sum of $27,170.83 and that the amount of tax due and owing thereon was the sum of $11,646.03, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $110,279.96, upon which said net income he owed to the United States of America an income tax of $78,629.55.

"In violation of Section 145 (b), Internal Revenue Code; 26 USC, Section 145 (b)."

The Grand Jury in the second count futher charges:

"That on or about the 15th day of March, 1946, in the Northern District of California, Southern Division, Chin Lim Mow, late of Oakland, California, who during the calendar year 1945 was married to Chin Wong Shee, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Chin Wong Shee to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of [5] California, at San Francisco, California, a false and fraudulent income tax return for and on behalf of the said Chin Wong Shee, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of $27,170.83 and that the amount of tax due and owing thereon was the sum of $11,646.03, whereas, as he then and there well knew, her net income for the said calendar year, computed on the community-property basis, was the sum of $110,279.96, upon which said net income there was owing to the United States of America an income tax of $78,629.55.

"In violation of Section 145 (b), Internal Revenue Code; 26 USC, Section 145 (b)."

That is signed by the duly appointed Foreman of the Grand Jury.

Now, upon his arraignment on this charge the defendant pleaded not guilty, and by so doing he put in issue every material allegation contained in the indictment which I have just read to you.

Now, I instruct you, ladies and gentlemen, that within his option the defendant has the right, under the law, to be sworn as a witness in his own behalf and testify, if he so chooses, or not as he may be so advised; and, therefore, as a matter of law, you, as jurors, are not entitled to draw any inferences whatsoever against the defendant because he exercised this privilege, which is accorded to him under the law, of standing [6] upon the case made against him by the Government, without being sworn and without testifying upon his own behalf.

I instruct you that you are to determine the guilt or innocence of the defendant solely from the evidence which has been adduced here on the witness stand and admitted in evidence by the Court. If you have read any account containing alleged statement of the facts involved in this case, you are to dismiss that from your mind and disregard it. You are not to base your verdict upon the expression or expressions contained in any newspaper. You are to decide this case entirely upon what you have heard in this courtroom, and not otherwise.

The laws of the United States do not require that a taxpayer in keeping his books and records adopt any particular method or system of accounting. A taxpayer may adopt any system or method of bookkeeping or accounting so long as he believes it will properly reflect his income.

The law does not require that a taxpaper himself prepare his income tax return. A taxpayer may employ an accountant or other person skilled or versed in the preparation of income tax returns to prepare the taxpayer's income tax return.

With respect to each count of the indictment, it is not sufficient for the Government, in order to establish the guilt of the defendant merely to prove that the return mentioned in said count of the indictment understated the income for the year in question or the amount of tax due [7] thereon. The defendant in this case is not on trial for filing a return that understated his income or the income of his wife, or the tax due on either his income or his wife's income. The Government must prove to a moral certainty and beyond a reasonable doubt, in addition to the fact that such return of the defendant or his wife understated the income for the year involved, that such return containing an understatement of said income was filed knowingly and wilfully by the defendant Chin Lim Mow with knowledge on the part of the defendant Chin Lim Mow that such return did not correctly set forth all said income, and that said defendant Chin Lim Mow filed the same with the intent on his part to defraud the United States out of the amount of tax that would be imposed on such additional income.

In order to prove the guilt of the defendant under each count of the indictment on file in this case, the Government of the United States must establish by the evidence in the case and to a moral

certainty and beyond a reasonable doubt, each of the following matters and things:

1. That the defendant filed or caused to be filed the income tax return set forth in said count of the indictment;

2. That said income tax return was false in that it did not correctly set forth all of the taxable income for the year in question;

3. That the defendant Chin Lim Mow knew that said income tax return was false and did not set forth all of the [8] taxable income for the year in question;

4. That the defendant Chin Lim Mow filed or caused said income tax return to be filed with the specific intent on his part to evade the payment of income tax to the United States and to defraud the United States out of such additional income tax as would have been due had the full income for such year been reported in said income tax return;

5. That there was due to the United States for the year in question, income tax over and above that reported or paid for the year in question.

Now, if the Government fails to prove any one of the foregoing five essential elements of the offense for which the defendant is on trial, to a moral certainty and beyond a reasonable doubt—again I say I shall subsequently define that for you—you must return a verdict finding the defendant Chin Lim Mow not guilty on such count of the indictment.

One of the essential elements of the offense for which the defendant is on trial is that there was due and unpaid from the defendant and from the wife of the defendant to the United States, for the calendar year 1945, a tax over and above the tax paid by the defendant and his wife, respectively, to the United States for that year. That such additional tax was due and unpaid from the defendant and his wife, respectively, to the United States must be established in this trial by the [9] United States to a moral certainty and beyond a reasonable doubt, and if such facts are not proved beyond a reasonable doubt you must acquit the defendant, even though you should find that the income tax returns so filed by the defendant for said year were not true and correct. The crime charged in the indictment is that the defendant attempted to defeat or evade a tax due by him and his wife to the United States. If there was no tax due from the defendant or his wife over and above the amount of tax reported in their respective income tax returns, then he cannot be guilty of either of the offenses charged in the indictment.

The defendant Chin Lim Mow is only on trial in this action for the offenses set forth in counts one and two of the indictment. The offense as charged in count one is that on or about the 15th day of March, 1946, the defendant did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States for the calendar year 1945 by filing and causing to be filed with the Collector of Internal Reve-

nue a false and fraudulent income tax return, wherein he understated his income for said year and understated the amount of tax due for said year to the Government.

The offense as charged in count two is that on or about the 15th day of March, 1946, the defendant Chin Lim Mow did wilfully and knowingly attempt to defeat and evade a large part of the [10] income tax due and owing by Chin Wong Shee, the wife of the defendant, to the United States for the calendar year 1945 by filing and causing to be filed with the Collector of Internal Revenue a false and fraudulent income tax return for and on behalf of said Chin Wong Shee, wherein the income of Chin Wong Shee for said year and the amount of tax due thereon to the Government were understated.

The defendant is not on trial for having committed any other offense, and you cannot find the defendant guilty at this trial merely because the evidence may disclose that at some other time the defendant may have violated an internal revenue law of the United States.

We have heard a great deal about net worth during the trial of this case. The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods, can reasonably be accepted as accurate.

The prosecution has introduced evidence which, it is claimed, tends to show the commission by the

defendant of other acts similar to those charged in the indictment. You are again instructed, however, that the defendant is not on trial for any acts or offenses other than those specifically charged in the indictment.

This evidence of similar acts has been admitted for [11] whatever bearing it may have upon the defendant's state of mind in connection of the acts charged in the indictment; in other words, such evidence may be considered by you in determining whether the defendant had a guilty intent or knowledge in reference to the charges made in the indictment. Such evidence of similar acts may not be considered by you for any other purpose in this case. You are further instructed that proof of similar acts—that is, acts similar to those with which the defendant is here charged—must be established by evidence which is plain, clear, and conclusive.

Now, evidence has been introduced in this case as to verbal statements and admissions claimed to have been made by the defendant. Such testimony is to be received by you with caution.

Testimony of Government witnesses should be weighed and scrutinized in the same manner as any other witness who has testified in this case, and the same rules for the determination of credibility apply.

To establish its case the Government must prove, first, that income tax was due and owing by the defendant in addition to that declared in his original income tax return; and, second, that the defendant wilfully attempted to evade and defeat such tax.

You must be convinced that both a tax was due and owing in addition to that declared on his return, and that the defendant [12] wilfully attempted to evade and defeat such tax.

The possession of money alone is not sufficient to establish net taxable income. That evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income.

You are instructed that when in a trial on charges of income tax evasion discrepancies between the defendant's returns and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict.

If you find that the defendant, Chin Lim Mow, had substantial taxable income for the year 1945 which he did not report in his income tax return, then you will find that there was a substantial amount of additional tax due to the United States Government for that year by the defendant. The same principle applies to the count involving Chin Wong Shee's taxes. Again, that is the wife of the defendant.

If you find that there were any gains, profits or income received by the defendant which were not reported, it makes no difference as far as the question of taxability is concerned whether such income was lawfully received or unlawfully received, inasmuch as both were taxable.

If the defendant intentionally handled his income so as [13] to avoid making an accurate return of such income and then filed a return which, to his knowledge, substantially understated his income, and the tax-evasion motive played any part in such conduct, the offense charged may be made out even though such conduct may also have served other purposes, such as concealment of other crime or crimes.

The duty to file the return is personal, and it cannot be delegated. Bona fide mistakes should not be treated as false and fraudulent, but no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he files, whether prepared by him or prepared by somebody else.

I instruct you that it is not necessary for the Government to offer direct proof of wilfulness.

It is a rare case in which the defendant has said to a witness that he did certain acts with the purpose of evading his tax liabilities.

In making your decision, therefore, as to whether or not the acts tending to conceal the defendant's true tax liability were wilful, you may consider all of the circumstances of the case. You may infer wilfulness from the kind of evasion, if any, which you find defendant committed, from his opportunity to know the true amount of his net income, and from such other facts which point to the existence or nonexistence of the [14] criminal state of mind in the defendant.

You are instructed, ladies and gentlemen of the jury, that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observations and knowledge to things that are put out in the open and are obvious to him, and say, "I have no knowledge of those facts." He can't do that. He must exercise such intelligence as he has, and, if the evidence shows that he intended to conceal tax liabilities from the Government, then of course he was not acting in good faith. This question of intent is a question you must determine for yourselves from a consideration of all the evidence that has been presented before you in the trial of this case.

Now the gist of the offense charged in the indictment is wilful intent on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt," as used in this law, involves two elements:

First, an intent to evade or defeat the tax; and, second, some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and understanding that during the calendar year 1944 he had an income which was taxable and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar year and which he knew it [15] was his duty to state in his return for such year.

There are various schemes and subterfuges and devices that may be resorted to to evade or defeat

the tax. The one alleged in this indictment is that of filing a false and fraudulent return with the intent to defeat the tax or liability.

The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant. The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and therefore the Government was cheated or defrauded of taxes, that he intended to defeat the tax.

The indictment in this case charges a violation of Section 145 (b) of Title 26, United States Code, which so far as it applies here reads: "* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter shall be guilty of an offense."

The jury may regard any act or statement of a person charged with crime tending to show consciousness of guilt to [16] be considered together with other evidence in the case. This applies to false statements, if any made, by the accused in attempting to explain proven facts.

While the accused at the beginning of a trial is presumed to be innocent, yet if the proof establishes

his guilt beyond a reasonable doubt, then the presumption of innocence disappears completely.

The person who commits a crime through the agency of another with whom he has arranged for assistance in the commission of the crime, is as guilty in the eyes of the law as if he had committed the crime himself personally without the assistance of any kind.

The Government is not required to prove guilt to a mathematical certainty, nor is the Government required to establish the exact amount of unreported income.

That is to say, evidence of a source of unreported income in 1940-1944 and a scheme of conduct resulting in such income in 1940-1944 may be considered by you in determining whether or not the defendant used a similar scheme and plan and whether or not defendant had a similar source of unreported income in 1945; and evidence tending to show a wilful intent to conceal taxable income in 1940-1944 may be considered by you in determining the question of whether or not defendant has a wilful intent to conceal taxable income during 1945.

Now, the defendant herein is charged with wilfully [17] attempting to evade income taxes for the year 1945 by filing a false return. Certain evidence has been admitted relating to events which occurred in other years. Now, this evidence has been admitted under the rule that acts similar to those charged in the indictment can be proved to show intent when they are sufficiently near and so related

in kind as to throw light on the question of intent and are closely related and of the same general nature as the transactions out of which the alleged criminal act arose. Evidence of such facts and circumstances, both prior and subsequent, are admissible if not too remote in time.

Evidence has been admitted in the trial of this case as to the practice of gambling during the year 1945 on the premises controlled by defendant, and evidence has been admitted that the defendant received income from the practice of gambling during 1945 on which he paid no tax.

Such evidence, if believed, may be considered by you only for the limited purposes of showing that defendant had a source of income from an illegal business which he concealed from the tax authorities. It may be considered by you to show that the defendant had a plan or scheme of operation in prior years resulting in income to the defendant continuing over to and similar to that used in 1945, and to show the intent of the defendant to defraud the Government of income taxes during the year 1945. [18]

Now, in weighing the evidence in this case you are entitled to consider, among other things, the fact, if you find it to be a fact, that one or both of the parties have not called available witnesses, having knowledge of facts material to the issues in this case. And I charge you that in weighing the failure to produce any such evidence, the strength of the inference to be drawn against a party not

producing evidence depends on the circumstances of the particular situation.

For example, you may consider the probability that under ordinary circumstances a relative or employee of a party is likely to be biased in favor of the party to whom he is related or by whom he is employed.

If, under such circumstances, a relative or employee of a party is not called as a witness when it would have been normal to do so, you would be warranted in drawing the conclusion that the testimony of such witness would not be favorable to the party calling him.

The Government is required to prove its case beyond a reasonable doubt. But the requirement of proof beyond a reasonable doubt is a direction to the jury, not a rule of evidence; it operates on the whole case, and not on separate bits of evidence each of which need not be so proven.

In considering whether the Government has established a case for conviction, the evidence taken as a whole must convince you beyond a reasonable doubt —again I say as I [19] shall define reasonable doubt to you subsequently—beyond a reasonable doubt of the defendant's guilt.

In connection with the alleged specific instances of fraud, one of the matters to be determined by you is the validity of certain so-called bonus arrangements with employees of the Wai Yuen Club, which club was owned and operated by the defendant. If you should find as a fact that the above bonus

checks were not paid as wages but were delivered to the employees involved with the understanding that the amounts involved would be returned to the defendant for his use, you may consider this evidence in reaching your decision as to whether or not the defendant is guilty of the offenses charged in this indictment.

Considerable evidence has been presented during the conduct of this trial concerning the bona fides or good faith of certain 1945 partnership income tax returns in which the defendant was shown as a partner. One of the issues to be determined by you is whether or not the defendant filed, or caused to be filed, these particular partnership returns, or any of them, for the purpose of defrauding the Government of income taxes by reporting income in lower brackets than would have applied if the defendant and his wife had reported all the income reported by the partnerships in question. In determining this matter, you are at liberty to consider and weigh all the testimony in the record bearing on this issue. [20]

Every person, except wage earners and farmers, liable to pay income tax is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits and other matters required to be shown in any income tax return.

The word "wilful" when used in a criminal statute generally means an act done with a bad purpose; without justifiable excuse; or stubbornly, obstinately,

perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether one has the right so to act.

The law provides that if the method of accounting employed by a taxpayer does not clearly reflect his income, income shall be computed in accordance with such method as, in the opinion of the Commissioner of Internal Revenue, clearly reflects the taxpayer's income. Where a taxpayer's records are inadequate or inaccurate in substantial respects, the courts have recognized that it is proper to determine taxable income by the net worth and expenditures method.

The Government does not have to prove the exact amounts of unreported income.

In offering proof that the defendant attempted to evade and defeat payment of income taxes by filing fraudulent returns, the Government is not limited to a single mode or method of proof. In the present case, the Government has sought [21] to show that defendant fraudulently caused part of his income and part of his wife's income to be reported in the names of other persons in order to get in a lower tax bracket and thus pay less tax in the year 1945 than was due. The Government has also sought to show by the net worth and expenditures method that the defendant fraudulently understated his net income and that of his wife for the year 1945. It is for you to determine whether the Government has proved fraud. But, for the Government to prevail on this issue, it is not necessary that it establish fraud by both methods. It is sufficient to establish

that part of the Government's case, if you find that it has proved fraud by either method.

Now, there have been introduced in evidence in this case certain sworn statements and affidavits of persons having knowledge of the facts to which they made oath. I charge you that either the Government or the defendant is entitled to rely on a sworn statement or affidavit given for a serious purpose, unless there is reason for you to discredit such sworn statement or affidavit.

Now, you have heard expert testimony relating to the issues involved in this case. I charge you that the computations made by an expert are for the convenience of both sides in presenting the case for your consideration. You are not bound by the computations or summaries or other testimony of an expert witness, but you should give such testimony the weight [22] to which you determine it is entitled in the light of the other proof in the case, and also with reference to your conclusions as to whether or not the facts on which the particular expert's testimony was based have been established by the necessary degree of proof. And of course you may reject all of such expert testimony, if, in your opinion, the reasons which are given for it are unsound.

The Government of course must establish the guilt of the defendant beyond a reasonable doubt. Proof of guilt should exclude every reasonable hypothesis of innocence, but need not go beyond that point. That is to say, the Government thus proves its case

beyond a reasonable doubt, but the Government is not required to exclude every possible hypothesis of innocence.

Now, in every crime, ladies and gentlemen of the jury, there must exist a union or a joint operation or act and intent, or what we lawyers call criminal negligence. The intent or intention is manifest by the circumstances connected with the offense charged and the sound mind and discretion of the accused person. And all persons are considered to be of sound mind who are neither idiots nor lunatics or otherwise affected with insanity.

In every criminal proceeding, under our system of criminal jurisprudence, the defendant is presumed to be innocent until the contrary is proven; and in the case of a reasonable doubt [23] whether his guilt is satisfactorily shown, he is entitled to an acquittal. Presumption of innocence attaches at every stage of the case, to every fact essential to a conviction.

Reasonable doubt, ladies and gentlemen, is that state of the case, which, after an entire comparison and consideration of all of the evidence, leaves your minds in that condition that you cannot say that you feel an abiding conviction to a moral certainty to the truth of the charge.

The law, however, does not require demonstration, that is, such a degree of proof as, excluding the possibility of error, produces absolute certainty, because such form of proof is rarely possible. Moral certainty only is required or, in other words, that

degree of proof which produces conviction in an unprejudiced mind.

By "reasonable doubt," therefore, is not meant every possible or fanciful conjecture that may be imagined by you or surmised by you or suggested to you. The rule is not there must be an acquittal in all cases of possible doubt, because everything relating to human affairs and depending upon moral evidence may be open to some possible or imaginary doubt.

You ladies and gentlemen, if I have heretofore told you, are the exclusive judges of the weight of the evidence herein and the credibility of the witnesses. A solemn duty is imposed upon you—one of the most solemn duties as I indicated heretofore, of your citizenship. It is for you alone to [24] judge the credibility of the witnesses, the weight to be given the evidence offered, and its effect and its conclusiveness to establish that fact for which it has been offered.

Now, in so doing you may consider the conduct, the appearance and demeanor of the witness upon the stand, the consistency or inconsistency, the reasonableness or unreasonableness, and the probability or improbability of any statement made by any witness. You have a right, also, to consider the interest that a witness may have in the result of this trial; and from these, and such questions as may have occurred to you on the evidence presented to you, you will arrive at your conclusion as to the weight, the effect and the sufficiency of the testimony offered.

Every witness is presumed to speak the truth. This presumption may be repelled by the manner in which the witness gives his or her testimony, by the character of the testimony offered, and by the motives which may actuate a witness in coming here to give his or her testimony.

Any witness found by you to be wilfully false in a material part of his or her testimony is to be distrusted by you in other parts.

Now, your power of judging of the effect of evidence is not an arbitrary power, but is to be exercised with legal discretion and in subordination to the rules of evidence. When I say it isn't an arbitrary power I mean this; that you [25] must exercise it with reasonable discretion.

The Judge and jury form a sort of a team. I pass upon the law, you people upon the questions of fact. We work together. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption of law or other evidence satisfy your minds. In other words, it isn't the greatest number of witnesses that should control you where their testimony is not satisfactory to your minds against a less number whose testimony does satisfy your minds and produces a moral conviction that they are telling the truth. To put it another way, it is upon the quality of the testimony rather than the quantity or number of witnesses that you should act, provided it produces in your minds this moral conviction that satisfies you of its truthfulness.

You are the sole and exclusive judges of the credibility of the witnesses who have testified in this case. The conduct of the witnesses, their character as shown by the evidence, and their manner on the stand and relation to the parties may be taken into consideration for the purpose of determining their credibility and as to whether they have spoken the truth or not. And you may scrutinize not only the manner of the witnesses on the stand, their relation to the case, if any, but also their degree of intelligence, their bias or prejudice, if any, the reasonableness or unreasonableness of their [26] statements, and the strength or weakness of their reasons.

Under your oaths as jurors you are to take into consideration only such evidence as has been admitted by the Court, and you must, in obedience to your oaths, disregard and discard from your minds every impression or idea suggested by questions asked by counsel which were objected to and to which objections were sustained by the Court. The defendant is to be tried only on the evidence which is before the jury, and not upon suspicions that may have been excited by questions of counsel, and answers to which were not permitted.

The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in a case of this character.

Now, I want to instruct you upon the question of circumstantial evidence. There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find

an accused person guilty of crime. One is direct or positive evidence of an eye witness to the commission of the crime, and the other is proof of testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and that is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, such as being himself in a position to commit it, or by any acts, declarations or circumstances [27] admitted in evidence tending to connect the defendant with the commission of the crime.

In order to convict, circumstances must be such as to produce the same certainty as direct evidence. There is nothing in the nature of circumstantial evidence which renders it any less reliable than any other class of evidence. Provided it produces in the minds of the jury a conclusion of the defendant's guilt beyond a reasonable doubt, it is sufficient. So, therefore, if upon a consideration of the entire cause or case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of a defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence, because the law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt, by evidence of either the one character or the other, or both. In cases of circumstantial evidence circumstances should be proven which are not only con-

sistent with the guilt of the defendant, but inconsistent with any other reasonable hypothesis of innocence.

Now, ladies and gentlemen, you have been here many days for the purpose of trying the issues of fact that are presented by the allegations contained in the indictment filed by the grand jury, and the defendant's plea was not [28] guilty to that indictment. This is a duty that you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of his race or the nature of the charge against him. You should not allow the question of punishment of the defendant to enter into your consideration. That is my business, my own exclusively. I will take care of that. You are to be governed, therefore, solely by the evidence introduced in this trial and the law as I have given it to you. [29]

The law will not permit jurors to be governed by mere sentiment, conjectures, sympathy, passion or prejudice. Sympathy is a very commendable quality in the human family, but it has absolutely no place in the jury box. A verdict founded upon sentiments or pity for the accused, or upon public opinion or public feeling, or upon conjecture or suspicions or rumors, or any factors of that character, would be a false verdict. You will not take counsel of it in deliberating upon your verdict. The importance of your duty requires that you consider the right of the Government to have the laws properly executed, and it is with you citizens selected

from this district there finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty the laws might just as well be stricken from the statute books.

You should also ever keep in mind the importance to the accused of the result of your deliberations, and be just to him as well as to the Government. Both the Government and the defendant have a right to demand, and they do demand and expect that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment, and that you will reach a verdict; and we contemplate that you will reach a verdict that will be just to both sides, regardless of what the consequences may be to anyone concerned. [30]

In this case, ladies and gentlemen of the jury, if upon a review and consideration of all the evidence before you you should be satisfied beyond a reasonable doubt that the defendant here is guilty, you will so declare by returning a verdict finding him guilty as charged. If you are not satisfied of his guilt beyond a reasonable doubt, you should unhesitatingly return a verdict finding him not guilty.

Now, counsel, I am about to conclude my instructions. Is there anything you wish to take up with the Court prior to that? If so, I will excuse the jury.

Mr. Sullivan: Yes, this, your Honor: there are the usual proceedings for the defense under Rule

30, and we would respectfully invite your Honor's attention to that.

The Court: I will excuse you, ladies and gentlemen, for a few minutes while I take up certain matters with counsel. Remember that you are not to discuss the case among yourselves as the case has not yet finally been submitted to you. You will reserve judgment until I have concluded my instructions. We will be just a few minutes You will retire to the jury room.

(Thereupon the jury retired from the Courtroom, and the following proceedings were had outside the presence of the jury.)

The Court: You may proceed.

Mr. Sullivan: May it please your Honor, pursuant to [31] Rule 30 of the Federal Rules of Criminal Procedure, and to all applicable rules of Federal Procedure and all applicable statutes, the defendant at this time respectfully enters certain exceptions and objections to the charge of your Honor to the jury, and to the omissions of requested charges of your Honor to the ladies and gentlemen of the jury, that is, the requests made by the defendant.

The defendant objects and excepts to the Court's charge to the jury in accordance with the following instructions requested by the Government: 3, 4, 5, 6, 8, 9, 10, 11, 12, 16, 17, 20, 25, 26, 27, 28, 29, 42, 44, 46, 47, 48, 49, 50, 51, 52, 53, and 54.

As part of said objections and exceptions, and as ground therefor, the defendant, if your Honor

please, without in any way limiting our specifications to those hereafter stated, further specifies as follows:

1. With respect to Instruction No. 4, the second sentence thereof is not a correct statement of law and is not supported by legal authorities, and the instruction does not specify the chain of circumstances referred to therein.

2. With respect to Instruction No. 5, that such instruction omits language from the case noted in support thereof to the effect that the burden of proof in the criminal case is always on the Government and never shifts. Furthermore, the giving of such instruction in its present form would permit [32] the jury to draw an unfavorable inference from the defendant's failure to testify in the case at bar. Furthermore, the Bell case, relied upon by the Government in this instruction, does not support the proposition as stated in the instruction, but refers only to situations where the defendant has taken the stand in his own defense and failed to explain, or has failed to explain, discrepancies in statements made before trial.

3. With respect to Instruction No. 6, said instruction is ambiguous and uncertain in that it does not identify the character of the income referred to, that is, whether net income or gross income.

4. With respect to Instruction No. 10, said instruction sets up an improper standard of conduct, namely, a standard of "good faith and ordinary

diligence'' as the ''responsibility'' of every person who can read and write. Failure to conform to such standard does not necessarily constitute a crime.

5. With respect to Instruction No. 11, said instruction does not correctly state the law, and considered with other general instructions on intent, is ambiguous and confusing. It does not take into account the ''reasonable hypothesis plan'' and the requirement that the jurors accept that hypothesis which is consistent with innocence rather than that which is consistent with guilt.

6. With respect to Instruction No. 12, said instruction [33] does not accurately set forth the applicable law and is not supported in its form by the citation noted. It can be construed as setting up a test of whether the defendant was acting in good faith instead of the test of criminal intent.

7. With respect to Instructions Nos. 20, 21 and 25, upon the grounds that there is no basis for the giving of these instructions, that is, no ground in the evidence in the record.

8. With respect to Instruction No. 27, that such instruction does not accurately set forth the law and is not applicable to the evidence in this case.

9. With respect to Instruction No. 29, the first paragraph of said instruction is not based upon the evidence in the record, and the second paragraph of said instruction is not logically related to or connected with the first paragraph. Furthermore, such

instruction is generally ambiguous and confusing and does not accurately set forth the law.

10. With respect to Instruction No. 42, upon the grounds that it does not correctly state the law. Furthermore, the probability does not exist under ordinary circumstances that a relative or employee is likely to be biased as stated in the instruction.

11. With respect to Instructions 43, 44 and 45, upon the grounds that they do not correctly state the law. Such instructions could be construed by the jury to mean that they do not absolutely have to hold the government to a burden of [34] proof to a moral certainty and beyond a reasonable doubt, and that it is within their discretion to relax this legal requirement.

12. With respect to Instruction No. 46, upon the grounds that it is not applicable to the evidence in the case, that it disregards evidence in the case, and that it treats only some but not all of the factors of evidence in the particular subject matter of the instruction.

13. With respect to Instruction No. 47, upon the grounds that it does not correctly state the law applicable to the various partnership returns of income involved in this case at the time that they were filed. The instruction does not set up the proper criteria which determines whether such partnerships were valid for income tax purposes or not.

14. With respect to Instruction No. 49, upon the

ground that the last sentence of said instruction does not accurately state the law.

15. With respect to Instruction No. 50, such instruction does not set forth the recognized criteria for net worth cases as contained in the statutory and decisional law. In view of this the last paragraph is misleading and ambiguous and the last sentence of the instruction is not an instruction on a subject of law, but is an instruction upon a question of fact, an assumption of fact, and generally improper and prejudicial. [35]

16. With respect to Instruction No. 51, upon the grounds that said instruction does not accurately state the law, that it is not supported by the citation noted, that there is no basis for the concepts of the methods of proof indicated, and that the instruction is generally confusing and ambiguous.

17. With respect to Instruction No. 52, such instruction does not accurately state the law, instructs on a question of fact, does not accurately state the principle of admissions against interest as a principle of the law of evidence.

18. With respect to Instruction No. 53, upon the grounds that it does not accurately state the law with respect to expert witnesses.

19. With respect to Instruction No. 54, upon the grounds that it does not accurately state the reasonable hypothesis doctrine, is misleading to the jury, and would be subject to interpretations at variance with the general instructions given by the Court.

20. With respect to Instruction No. 56, upon the grounds that it is not applicable to the evidence, that it does not accurately state the law, and that it is confusing and ambiguous.

With respect to all other instructions excepted and objected to, and for which no separate specification has been made as I have done, the defendant further specifies that such instructions, when read together with other instructions [36] proposed to be given, and given, as requested by the Government and given by the Court, as the so-called stock instructions, do not accurately and correctly state the law in all instances, and in instances when so read are confusing and ambiguous.

The defendant very respectfully states that in making the foregoing specifications the defense makes them without waiving any other ground of objection that——

The Court: That you haven't thought of.

Mr. Sullivan: Yes, your Honor.

The Court: All right, the record will show that.

Mr. Sullivan: And furthermore, if your Honor please, the defendant respectfully objects to an instruction which I can't identify except in its substantial matter, which apparently was an instruction of the Court's own selection and not proposed by either counsel, to the effect that it is the law that the defendant on his own volition, as I remember your Honor's words, may testify and take the stand, or he may decide not to, standing upon the case as made against him by the Government. I respectfully except to the giving of that instruction.

The Court: I think you proposed it.

Mr. Sullivan: If I did, your Honor——

The Court: I will thumb through them, but I didn't give it upon my own volition, I know that. Those were proposed by you or Mr. Fleming, and I was inclined to believe it was [37] proposed by you.

Mr. Sullivan: Then, your Honor, it is a situation in which——

The Court (Interposing): Do you recall, Mr. Fleming, if you proposed such an instruction?

Mr. Fleming: I think I proposed a standard instruction in the form of the weight of the testimony —failure to testify.

The Court: I recall very well giving the instruction.

Mr. Sullivan: If it hasn't been given by your Honor as a stock instruction it is covered by my other objections, your Honor, and I won't further specify.

The Court: Very well.

Mr. Sullivan: I further except to what apparently was a stock instruction of your Honor and not proposed by either counsel upon the subject of circumstantial evidence, which in substance instructed the jury that such a type of evidence was of equal dignity with the evidence which is direct evidence; and, further, instructed the jury that upon that evidence they could form a conclusion as to the defendant's guilt.

I make the exception upon the ground that the instruction was not balanced, and that the jury should be instructed or advised that they could,

upon such evidence, also reach a conclusion of the defendant's innocence as well as his guilt, [38] upon that character of evidence.

The Court: I don't know how you can have any exception to that. It has been a law recognized in both State and Federal Courts for many years. But you may have your objection.

Mr. Sullivan: With respect to the defense instructions, now, if your Honor please, the defendant now objects and excepts to the Court's failure and omission to charge the jury in accordance with each and all of the instructions requested by the defendant, including the additional instructions requested at the conclusion of the evidence, save and except the following instructions which were included in the Court's charge to the jury: Nos. 34, 35, 36, 39, 42, 43, 52, 57, 58, 59.

With respect to the aforementioned omissions from the charge to the jury hereinabove excepted and objected to, the defendant as a part of said objections and exceptions, and as grounds therefor, further specifies:

1. With respect to each of the requested instructions numbered 33 through 59, which have been omitted from the charge to the jury, the defendant specifies that each of them clearly state the law; that each of them is necessary in order to fully, accurately and properly advise the jury of the matters and principles of law involved in this case; and that the omission of any one of them will result in the situation where the jury is not fully advised of the applicable legal principles. [39]

2. With respect to requested instructions Nos. 44 through 55, the additional specification is made that the omission from the charge to the jury of each of said instructions leave the jury without a full, clear or accurate instruction upon the legal principles pertaining to the so-called net worth expenditures method of computing income.

The jury cannot rely upon the testimony of witnesses for an explanation of the legal criteria on this subject, and cannot resort to the testimony of accountants for the standards of law. Net worth expenditures evidence is circumstantial evidence, and the jury must be instructed upon the pertinent legal principles so that such instruction can be coordinated with the general instructions on circumstantial evidence.

The jury must be instructed on the type and quantum of proof required by the net worth expenditures method under the law, so that it can apply such principles in following the Court's charge on the reasonable hypothesis doctrine. The Court must point out to the jury in its charge, the legal principle that at no time under the net worth expenditures method does the burden of proof from the Government, nor is it altered or changed in any way.

The Court must, we respectfully urge, instruct the jury upon the legal standards pertaining to the important factors of this net worth, among which are: the starting point, the [40] opening net worth, the increase, and other factors as set forth in the proposed requested instructions of the defendant.

The Court: Let your exceptions be noted, and the record will show they are denied.

Do you have anything to say, Mr. Fleming?

Mr. Fleming: No exceptions, your Honor.

The Court: Very well. Will you bring in the jury, Mr. Marshal?

(Thereupon the jury returned to the courtroom.)

The Court: Now, ladies and gentlemen, at long last the case is submitted to you for your consideration and your determination. Just one final word:

It is your duty individually to consider all of the evidence that has been presented before you under the law as given you by the Court, and you should reach a conclusion according to your very best judgment.

The law contemplates that you do reach a verdict. This has been a long trial and an expensive trial. In so doing, you should arrive at your verdict without fear, without favor, without prejudice or sympathy, performing your duty with a sense of the responsibility which rests upon you, and in conformity with your solemn oaths as jurors. You must all agree upon a verdict. In other words, the verdict must be unanimous.

When you arrive in the jury room you will first select [41] a foreman or forelady who will preside over your deliberations and who will sign whatever verdict you arrive at. May I suggest respectfully that you exercise your judgment about who shall

be your foreman or forelady. Sometimes jurors say, "Well, you were the first one in the jury room," or "You were the last one in the jury room," or the third or fourth of fifth, "so you be the foreman." That is a rather stupid way to select a foreman or forelady. Show some discretion about that. Choose someone who will intelligently preside over your deliberations and sign your verdict to which you agree.

The form of verdict contains the title of the cause—title of court and cause, United States of America vs. Chin Lim Mow; "We, the jury, find Chin Lim Mow the defendant at the bar guilty or not guilty, as to Count 1, and guilty or not guilty as to Count 2." It is to be signed by the foreman.

Any of the exhibits which have been introduced in evidence, if you care to resort to them, they will be afforded to you by announcing your wishes to the Deputy Marshal, who will be assigned outside the jury room.

I don't think there is anything further. You may now retire.

Mr. Sullivan: Your Honor, please, may I presume to remind your Honor about the dismissal of the extra juror?

The Court: Yes. I am very sorry. Mr. Bearden, your duties are now at an end. You are [42] excused.

(Thereupon the jury retired to deliberate.)

The Court: The Court will be at recess.

Mr. Sullivan: Your Honor, please, Mr. Hubner

tells me that one of the jurors took an exhibit in with him that was on the seat in the jury box. I wonder if that situation could be corrected? It isn't an exhibit. It has been admitted in evidence, but it is a copy that was put on the chair.

The Court: Tell them to bring back the exhibit. Will that be satisfactory?

Mr. Sullivan: Yes, your Honor.

The Court: The Court will be at recess. [43]

CERTIFICATE OF REPORTER

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 43 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENETH J. PECK.

[Endorsed]: Filed October 27, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the record on appeal as desig-

nated by the attorneys for the appellants herein:

Indictment.

Arraignment.

Plea of Not Guilty.

Motion to quash subpoena.

Affidavit in support of motion to quash subpoena.

Order denying motion to quash subpoena.

Motion to strike evidence.

Minutes of October 10, 1952.

Minutes of October 13, 1952.

Minutes of October 17, 1952.

Plaintiff's instructions given.

Plaintiff's instructions refused.

Defendant's instructions given.

Defendant's instructions refused.

Verdict.

Motion in arrest of judgment.

Motion for new trial.

Minutes of November 3, 1952.

Judgment and commitment.

Notice of appeal.

Cost bond on appeal.

Order for transfer of original exhibits to Court of Appeals.

Appellant's designation of contents of record on appeal.

Reporter's transcript (23 volumes).

Reporter's transcript (Instructions to jury—1 volume).

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 10th day of December, 1952.

[Seal] /s/ C. W. CALBREATH,
Clerk.
By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13653. United States Court of Appeals for the Ninth Circuit. Chin Lim Mow, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal From the United States District Court for the Northern District of California, Southern Division.

Filed December 10, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

At a Stated Term, to wit: The October Term, 1952, of the United States Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City of San Francisco, in the State of California, on Wednesday, the twelfth day of November, in the year of our Lord one thousand nine hundred and fifty-two.

No. 13653

Present: Honorable William Healy, Circuit Judge, presiding; Honorable Homer T. Bone, Circuit Judge; Honorable Walter L. Pope, Circuit Judge.

CHIN LIM MOW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER ADMITTING APPELLANT TO BAIL PENDING APPEAL

Upon consideration of the Motion of Appellant, filed November 3, 1952, and of the opposition thereto, filed November 7, 1952, and of the oral arguments thereon, and good cause therefor appearing,

It Is Ordered that the motion for bail pending appeal be, and hereby is, granted in the sum of Thirty-five Thousand Dollars ($35,000.00), cash or bond, condition as required by law, to be approved by the United States District Court for the Northern District of California, and deposited in the registry of that court.

In the United States Court of Appeals
for the Ninth Circuit

No. 13653

CHIN LIM MOW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF

Appellant above named presents his statement of points upon which he intends to rely on appeal, and designates the parts of the record necessary for the consideration thereof, as follows:

Statement of Points on Appeal

1. Erroneous Admission of Evidence.

The Court committed numerous errors in ruling upon the admissibility of evidence over objections duly made, all of which rulings were highly prejudicial to appellant, as follows:

(a) The denial of appellant's motion to strike the testimony of the witness George Gibbons per-

taining to said witness' trips to Watsonville, Bakersfield, Alviso, Yosemite Club, Hollywood Club, 36 San Pablo Avenue, and The Palms.

(b) The admission in evidence of Government's Exhibits 56, 56a and 56b.

(c) The admission in evidence of (and the denial of a motion to strike) the testimony of the witness James T. Wiley pertaining to his identifying "Account No. 20" on the books of the Gerdon Land Co. (Government's Exhibit 56) with appellant, and the admission in evidence of the testimony of said witness as to how he "attributed" said account in his report to his superiors.

(d) The admission in evidence of all of the testimony of the witness Liston O. Allen, except that preliminary testimony pertaining to his identity and occupation.

(e) The admission in evidence of those certain cancelled checks drawn upon the trustee account of John J. Allen, Jr., and denominated Government's Exhibits 88, 91 and 108-114, inclusive.

(f) The admission in evidence of Government's Exhibits 92-95, incl.; 98, 247 and 248.

(g) The admission in evidence of the corporate minutes of Gerdon Land Co., denominated Government's Exhibits 297 and 298.

(h) The admission in evidence of those portions of Government's Exhibit 311 not connected up with appellant.

(i) The admission in evidence of the testimony of the witness Walter Valdi pertaining to an earlier social security tax investigation and of documents

denominated Government's Exhibits 48, 49, 59 and 156-159, inclusive.

(j) The admission in evidence of documents denominated Government's Exhibits 60 and 186.

(k) The admission in evidence of the testimony of the witness David Shew pertaining to Federal and State income taxes of persons other than the appellant, the returns of income prepared by said witness for such persons, the payment of taxes made by said witness for the account of such other persons, and the reimbursement of said witness for such moneys advanced, and the admission in evidence of exhibits pertaining to the above testimony and denominated Government's Exhibits 42-49, incl.; 188, 189, 191-197, incl.; 199-204, incl.; 208-211, incl.; 215, 220 and 221.

(l) The admission in evidence of certain balance sheets of the Bock Hing Trading Company, denominated Government's Exhibits 223 and 224, and the denial of appellant's motion to strike said exhibits, and the testimony of the witness Christopher M. Harnett in connection therewith.

(m) The admission in evidence of the testimony of the witness William A. Wallace pertaining to the character of the obligation and the identity of the obligee in respect to certain moneys owned by Gerdon Land Company, as reflected in Account No. 20 of the books of said Company.

(n) The denial of appellant's motion to strike the testimony of the witness William A. Wallace pertaining to the alleged receipt of information and instructions from appellant in respect to the shares

of partners to be indicated on various partnership returns of income in evidence.

(o) The admission in evidence of the testimony of the witness William A. Wallace pertaining to the source of information according to his "office routine" in respect to the partners' shares of income reported on various partnership returns of income, and in respect to certain partners' shares as appearing on Government's Exhibits 321-324, inclusive, together with the admission in evidence of said last-named exhibits in order "to show the office routine in the preparation of returns as brought out in previous testimony."

(p) The denial of appellant's motion to strike (made in written form and on file herein) the testimony of the witness William A. Wallace pertaining to the alleged receipt of information and instructions from appellant in respect to the reporting of certain items of income by certain children of appellant on said children's tax returns, to wit, by Alvin Chan (on Government's Exhibit 23), Janet Chan Lee (on Government's Exhibit 25), Norman Chan (on Government's Exhibit 29), and Bertha Chan (on Government's Exhibit 22), and the denial of appellant's oral motion (RT 1519) to strike the testimony of said witness William A. Wallace pertaining to the taking of allowances for depreciation as indicated on Government's Exhibits 19 and 20.

(q) The admission in evidence of the testimony of the witness William A. Wallace pertaining to a conversation of said witness with Revenue Agent

King in respect to the assessment of a 50% fraud penalty for the year 1939.

(r) The admission in evidence of the testimony of the witness William A. Wallace pertaining to the current employment of said witness by appellant (RT 1461-1463), certain testimony given by said witness on the first trial of this case (RT 1463-1467), and a sworn statement given by said witness to the Government on October 18, 1949 (RT 1522, et seq.).

(s) The admission in evidence of the testimony of the witness Charles King pertaining to certain stock brokerage accounts of appellant, and the admission in evidence of Government's Exhibit 171 in connection therewith.

(t) The admission in evidence of (and the denial of a motion to strike) the testimony of the witness Evelyn Lee Chang pertaining to a trustee account of Howard Chang and said witness in the Pacific National Bank, and to transactions relating thereto, and the admission in evidence of certain exhibits in connection with said testimony, denominated by Government's Exhibits 163, 230-235, incl.; 239-241, incl., and 243.

(u) The denial of appellant's motion to strike the testimony of the witnesses Dana E. Bremner, Leon C. Banker, Norman Ogilvie and L. F. Clarke pertaining to the real property located at 5000 Broadway, Oakland, and transactions in respect thereto.

(v) The admission in evidence of (and the denial of a subsequent motion to strike) the testimony

of the witness Evelyn Lee Chang pertaining to the receipt of money or income by her and her husband from the Kuo Hing Wah partnership, and to the interest of said witness and her husband in the Pierce Building, and the admission in evidence of Government's Exhibits 236-238, inclusive.

(w) The admission in evidence of the testimony of the witness Lester Farley pertaining to the capital contributions of appellant in the Elite Co.

(x) The admission in evidence of a certain chart of partnership returns prepared by the witness Frank Filice, denominated Government's Exhibit 275, and of a certain list of alleged income omissions prepared by said witness and denominated Government's Exhibit 334, and the testimony of said witness in connection therewith.

(y) The admission in evidence of (and the denial of a motion to strike) the testimony of the witness Augustus V. Brady, and the admission in evidence of certain documents, calculations, and charts prepared by said witness under the direction of the prosecution and denominated Government's Exhibits 280-282, incl.; 337-342, incl.; 344, 345 and 347.

The cumulative effect of admission of the evidence and exhibits above referred to undoubtedly influenced the jury in arriving at its verdict of guilty, and it is entirely probable that the exclusion of such evidence would have resulted in a verdict of not guilty.

2. Insufficiency of Evidence to Sustain the Verdict.

(a) There is no evidence to sustain the verdict on either count of the indictment.

(b) The verdicts on the First and Second Counts of the indictment and each thereof are contrary to the weight of the evidence.

(c) The verdicts on the First and Second Counts of the indictment and each thereof are not supported by substantial evidence.

3. Appellant's Motion for Judgment of Acquittal.

(a) The Court erred in denying appellant's motion for a judgment of acquittal made at the close of the evidence offered by the Government.

(b) The Court erred in denying appellant's motion for a judgment of acquittal made at the close of all the evidence.

4. Instructions Given.

The Court erred to the substantial prejudice of appellant in giving the jury the following instructions, to all of which counsel for appellant duly objected and stated their grounds therefor:

(a) "The possession of money alone is not sufficient to establish net taxable income. That evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income." (Reporter's Transcript, Court's Instructions to Jury, page 13, lines 2-7.)

(b) "You are instructed that when in a trial on

charges of income tax evasion discrepancies between the defendant's returns and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict." (RT 13, lines 8-12.)

(c) "The duty to file the return is personal, and it cannot be delegated. Bona fide mistakes should not be treated as false and fraudulent, but no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he files, whether prepared by him or prepared by somebody else." (RT 14, lines 7-13.)

(d) "You are instructed, ladies and gentlemen of the jury, that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observations and knowledge to things that are put out in the open and are obvious to him, and say, 'I have no knowledge of those facts.' He can't do that. He must exercise such intelligence as he has, and, if the evidence shows that he intended to conceal tax liabilities from the Government, then of course he was not acting in good faith. This question of intent is a question you must determine for yourselves from a consideration of all the evidence that has been presented before you in the trial of this case." (RT 15, lines 2-13.)

(e) "The jury may regard any act or statement of a person charged with crime tending to show consciousness of guilt to be considered together with

other evidence in the case. This applies to false statements, if any, made by the accused in attempting to explain proven facts." (RT 16, line 24, to RT 17, line 3.)

(f) "Evidence has been admitted in the trial of this case as to the practice of gambling during the year 1945 on the premises controlled by defendant, and evidence has been admitted that the defendant received income from the practice of gambling during 1945 on which he paid no tax.

"Such evidence, if believed, may be considered by you only for the limited purposes of showing that defendant had a source of income from an illegal business which he concealed from the tax authorities. It may be considered by you to show that the defendant had a plan or scheme of operation in prior years resulting in income to the defendant continuing over to and similar to that used in 1945, and to show the intent of the defendant to defraud the Government of income taxes during the year 1945." (RT 18, lines 12-25.)

(g) "In connection with the alleged specific instances of fraud, one of the matters to be determined by you is the validity of certain so-called bonus arrangements with employees of the Wai Yuen Club, which club was owned and operated by the defendant. If you should find as a fact that the above bonus checks were not paid as wages but were delivered to the employees involved with the understanding that the amounts involved would be returned to the defendant for his use, you may consider this evidence in reaching your decision as

to whether or not the defendant is guilty of the offenses charged in this indictment." (RT 20, lines 3-13.)

(h) "The word 'wilful' when used in a criminal statute generally means an act done with a bad purpose; without justifiable excuse; or stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether one has the right so to act." (RT 21, lines 6-11.)

(i) "In offering proof that the defendant attempted to evade and defeat payment of income taxes by filing fraudulent returns, the Government is not limited to a single mode or method of proof. In the present case, the Government has sought to show that defendant fraudulently caused part of his income and part of his wife's income to be reported in the names of other persons in order to get in a lower tax bracket and thus pay less tax in the year 1945 than was due. The Government has also sought to show by the net worth and expenditures method that the defendant fraudulently understated his net income and that of his wife for the year 1945. It is for you to determine whether the Government has proved fraud. But, for the Government to prevail on this issue, it is not necessary that it establish fraud by both methods. It is sufficient to establish that part of the Government's case, if you find that it has proved fraud by either method." (RT 21, line 22, to RT 22, line 12.)

(j) "Now, there have been introduced in evidence in this case certain sworn statements and affidavits

of persons having knowledge of the facts to which they made oath. I charge you that either the Government or the defendant is entitled to rely on a sworn statement or affidavit given for a serious purpose, unless there is reason for you to discredit such sworn statement or affidavit." (RT 22, lines 13-19.)

(k) "Now, you have heard expert testimony relating to the issues involved in this case. I charge you that the computations made by an expert are for the convenience of both sides in presenting the case for your consideration. You are not bound by the computations or summaries or other testimony of an expert witness, but you should give such testimony the weight to which you determine it is entitled in the light of the other proof in the case, and also with reference to your conclusions as to whether or not the facts on which the particular expert's testimony was based have been established by the necessary degree of proof. And of course you may reject all of such expert testimony, if, in your opinion, the reasons which are given for it are unsound." (RT 22, line 20, to RT 23, line 7.)

5. Instructions Refused.

The Court erred to the substantial prejudice of appellant in refusing to give the following instructions requested by counsel for appellant: 1-33, incl.; 37, 38, 40, 41, 44-59, incl., and 61.

6. Motion for a New Trial.

The Court erred in denying appellant's motion for a new trial.

Designation of Record

Appellant hereby designates the following record to be printed on this appeal:

1. The entire Clerk's Transcript of Record, including Requested Instructions of Defendant refused by the Court, but excluding Plaintiff's Instructions refused by the Court.

2. The 24 volumes of Reporter's Transcript of the entire proceedings, including the volume entitled "Court's Instructions to the Jury" and containing appellant's exceptions and objections to the charge to the jury and to the Court's failure to charge the jury as requested by appellant.

Appellant further designates that all exhibits in evidence, which have been sent to the Clerk of this Court, be considered on this appeal.

/s/ WILLIAM M. MALONE,

/s/ RAYMOND L. SULLIVAN,

/s/ WILLIAM B. WETHERALL,

/s/ CONRAD T. HUBNER,

Attorneys for Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed December 17, 1952.

[Title of Court of Appeals and Cause.]

STIPULATION DISPENSING WITH REPRODUCTION OF ORIGINAL EXHIBITS IN PRINTED RECORD

Whereas the original exhibits in the above-entitled case include many charts and other documents which cannot practicably be reproduced,

It Is Hereby Stipulated that all of the original exhibits in evidence in said case may be considered in their original form and need not be reproduced in the printed record on appeal.

Dated December 16, 1952.

CHAUNCEY TRAMUTOLO,
United States Attorney.

By /s/ MACKLIN FLEMING,
Assistant U. S. Attorney.

/s/ WILLIAM M. MALONE,

/s/ RAYMOND L. SULLIVAN,

/s/ WILLIAM B. WETHERALL,

/s/ CONRAD T. HUBNER,
Attorneys for Appellant.

[Title of Court of Appeals and Cause.]

ORDER DISPENSING WITH REPRODUCTION OF ORIGINAL EXHIBITS IN PRINTED RECORD

Upon consideration of the stipulation of the parties in the above-entitled case, and Good Cause Appearing Therefore,

It is ordered that the original exhibits in evidence in said case need not be reproduced in the printed record on appeal, and all such exhibits may be considered by this Court in their original form.

Dated December 16, 1952.

/s/ WILLIAM DENMAN,
United States Circuit Judge;

/s/ WM. HEALY,

/s/ WALTER L. POPE,
Judges, U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed December 17, 1952.

No. 13,653

IN THE

United States Court of Appeals

For the Ninth Circuit

CHIN LIM MOW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Constitutions

Statutes

Texts

Rules

No. 13,653

IN THE

United States Court of Appeals

For the Ninth Circuit

CHIN LIM MOW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

By indictment filed in the United States District Court for the Northern District of California, Southern Division, the appellant was charged in two counts of violating, within the jurisdiction of that Court, Section 145 (b) of the Internal Revenue Code, 28 U.S.C.A., Sec. 145 (b) (Tr. 3). The District Court had jurisdiction pursuant to 18 U.S.C.A., Sec. 3231 and Rule 18, Federal Rules of Criminal Procedure.

The appellant entered a plea of not guilty (Tr. 6). Upon the first trial, the jury were unable to reach an agreement. Upon the second trial, the jury returned a verdict of guilty on both counts (Tr. 75). By judgment filed and entered on November 3, 1952,

the appellant was sentenced to imprisonment for a term of five years on each count, said terms to run consecutively, and to pay a fine of $10,000.00 on each count, or a total of $20,000.00 (Tr. 84).

Notice of Appeal to this Court was filed on November 3, 1952, within the time allowed by Rule 37 (a), Federal Rules of Criminal Procedure (Tr. 87). Jurisdiction of this Court to review the final decision of the District Court is sustained by 28 U.S.C.A., Secs. 1291 and 1294.

STATEMENT OF THE CASE.

The indictment charged the appellant with attempting to defeat and evade the income tax owing by him and his wife, Chin Wong Shee, for the year 1945, by filing false and fraudulent returns for himself and his wife, computed on the community property basis, wherein he understated his and her net income and the amount of tax due thereon (Tr. 3-5). The first count pertained to appellant's return for the year 1945; the second count to his wife's return for the same year. The returns were almost identical in content except for the name of the taxpayer (see Exhibits 1 and 2).

In each of the counts it was charged that the income tax returns referred to therein, reported a net income of $27,170.83 and a tax of $11, 646.03, whereas the net income was $110,279.96 and the tax $78,629.55 (Tr. 3-5). It is thus seen that the indictment charges

a deficiency in income in respect to the return of each spouse in the sum of $83,109.13, representing a total deficiency in income for the marital community of $166,218.26 before the usual "splitting" of income for computation on a community property basis.

The record is voluminous. The printed transcript of record is in five volumes and covers 2127 pages. Thirty-seven witnesses testified at the trial. Documentary evidence consisted of approximately 400 exhibits which, though not included in the printed transcript of record, have been made a part of the record on appeal (Tr. 91, 2111, 2127).

The prosecution attempted to establish its case along two general lines or methods of proof: (a) the so-called "primary" or "direct" method—by proving certain alleged specific items of income omissions. These items were tabulated by the prosecution in Exhibit 334; (b) the so-called "secondary" or "indirect" method—in this instance the so-called "net worth and expenditures method". According to this method, any increase in the taxpayers' net worth during a certain period (viz., the year 1945) together with certain nondeductible expenses (e.g., personal living expenses) represents the taxable net income for the year (Tr. 1799-1800). The prosecution's net worth analysis of appellant is found in Exhibits 337-346; the defense net worth analysis in Exhibits DD and DE. The principal summary documents for the net worth calculations of the Government (Exh. 339) and of the appellant (Exh. DD) have been reproduced in the Appendix.

For the purpose of throwing light on appellant's intent, the prosecution introduced extensive evidence of allegedly similar acts and transactions of appellant, both prior and subsequent to the year 1945.

Although witnesses were called in defense and documentary evidence introduced, the appellant did not testify in his own behalf.

Appellant's background.

During the year 1945 and for some years prior thereto, appellant was a person of substantial wealth and a number of financial interests. At the beginning of the tax year covered by the indictment, 1945, his net worth according to the prosecution was $886,473.37 (Exh. 339) and according to the defense, $829,370.53 (Exh. DD). Both of the foregoing exhibits point up the variety of appellant's interests—partnerships operating real property, hotels, apartment houses and an office building; interests (as partner or stockholder) in wholesale and retail businesses located in San Francisco's Chinatown; a Chinese gambling club known as the Wai Yuen Club, and a miscellany of the usual personal assets, such as a home, automobile, life insurance, defense savings bonds, and real property. The tax returns of appellant and spouse for the year 1945 (Exh. 1 and 2) disclose that the principal sources of appellant's income were two: (1) rentals from real property, and (2) profits from the above gambling club.

During the year 1945 and for seven years prior thereto, appellant employed two accountants, William

A. Wallace and David Shew, each of whom testified on behalf of the prosecution (Tr. 754, et seq.; 1054, et seq.). Wallace's services began about 1938 or 1939 (Tr. 1148), at which time he also began rendering services to the Gerdon Land Co., a corporation also involved in appellant's tax background (see postea). He was appellant's tax consultant (Tr. 1147). His office set up and maintained books and records for the Gerdon Land Co. (Tr. 1148; Exh. 56, 56A and 56B); for five hotel operations conducted by the Admay partnership in which appellant had an interest (Tr. 1166-67; Exh. CL, CM, CN, CO and CP); assembled and retained written statements of rental income collected by certain real estate agents (Tr. 400); and attended to the preparation and filing of the tax returns of appellant and spouse (Exh. 1-10), four of appellant's children (Exh. 22-25, 29, 50-53, 55), the partnerships operating on the real property owned by appellant and by Gerdon Land Co. (Exh. 14-21, 30, 61-63, 66-70) and the corporate tax returns of the above Gerdon Land Co. (Exh. 304). (See testimony of Wallace, Tr. 1056-1117 passim).

David Shew rendered services to appellant continuously from 1939 or 1940 in connection with records of the Wai Yuen gambling club (Tr. 756). Starting on December 31, 1942, he set up and thereafter kept books of account in the English language for said club (Tr. 882; Exh. 184). He also within the scope of his activities was appellant's tax consultant (Tr. 875). He prepared annual profit and loss statements for the gambling club (Exh. 60) which were sent to

Wallace who incorporated this information in appellant's tax returns (Tr. 891). He also prepared tax returns for one of appellant's children (and spouse) who lived in San Francisco (Exh. 26-7, 54) and for several of appellant's associates in the Wai Yuen gambling club (Tr. 42-47).

The importance of both tax consultants in their role as prosecution witnesses is clear. Wallace's functions pertained to appellant's real estate income and the preparation of appellant's tax returns; Shew's functions pertained to appellant's gambling income from the Wai Yuen Club. Thus both covered the two principal sources of appellant's income. The length of their testimony in the record (Wallace 354 pages; Shew 299 pages; together almost one-third of the printed record) is significant.

Real property involved in the case.

We have already adverted to the fact that one of appellant's principal sources of income was from real property. This real property falls into two general classifications: (1) that owned by appellant himself and commonly referred to as "Chin property"; (2) that owned by Gerdon Land Co., a California corporation (Tr. 1181). No issue arose at any time during the trial either as to the parcels of property included in the first class, the ownership of which appellant freely admitted to the Revenue Agent at the beginning of the investigation (Exh. 169, Tr. 374), or as to the separate legal existence of the Gerdon Land Co. and its ownership of property of the second description.

The partnership issue.

Some of the real estate in each of the above two classifications was operated by partnerships during the years covered by the evidence. These partnerships also fall naturally into two groups depending on whether they were operated on appellant's property ("Chin" property) or the corporate property of Gerdon Land Co. ("Gerdon" property). In 1945 there were eight such partnerships, six of them on "Chin" property and two on "Gerdon" property (Tr. 1182) as follows:

Partnerships on Chin Property

Location	Tax Return
843-7 Clay Street, San Francisco	Exhibit 15
112-32 Waverly Place, San Francisco	Exhibit 17
674 Jackson Street, San Francisco	Exhibit 19
1555 Oak Street, Oakland	Exhibit 20
23rd and Broadway, Oakland	Exhibit 21
Pierce Building, Oakland	Exhibit 30

Partnerships on Gerdon Property

Location	Tax Return
Admay Company*	Exhibit 13
San Fran Hotel	Exhibit BU

Wallace's office prepared the partnership returns of income for all of the above (Tr. 1056-1117 passim). In some locations his office had been doing it year after year (Exh. 14, 16, 18, 61, 62, 66, 66(a), 67-70, 318-24). During these years Wallace's office followed

*The Admay Company conducted ten separate hotel and apartment house operations on property which it leased from Gerdon Land Co. (Tr. 418-9; 1164).

the routine of transposing from such partnership returns to the individual returns being prepared for appellant and his family, the partner's share or distribution of profit appearing on the partnership return (Tr. 1180). At the time the above eight partnership returns were prepared and filed by Wallace's office, he knew the state of the title (Tr. 1182). It was not disputed that in each instance the items of income and expense (including the depreciation which Wallace's office calculated) were accurately reported. None of the Government agents (witnesses Wiley, Farley and Filice) challenged the accuracy of these figures. Wallace's office, through his associate Peffers, considered the validity of the operations as partnerships for tax and accounting purposes (Tr. 1244). The use of these partnerships in earlier years was known to the Bureau of Internal Revenue and a subject of discussion among its agent Charles King, Wallace and appellant (Tr. 1200).

In development of its "specific item" method of showing income omissions, the Government sought to prove that the partnerships were fictitious and were in reality employed by appellant to put his real estate income in the "lower tax brackets". In support of this contention, the Government elicited from its witness William A. Wallace, one of appellant's accountants, testimony to the effect that Wallace had received from appellant information and instructions as to the division of the partnership income among the various partners (Tr. 1063-1105, passim). In addition, the Government sought to show that such instructions of

appellant to Wallace even extended to the manner of reporting income on the tax returns of certain of appellant's children, which Wallace had prepared at appellant's request (Tr. 1109-1117). On both of these subjects, Wallace, during his cross-examination testimony, admitted that in fact he had no personal knowledge of the above facts which were relied upon to support the charge of fictitious partnerships (Tr. 1290-94). Appellant's motion to strike the foregoing testimony was denied (Tr. 15, 1948). In an attempt to further support the contention that the partnerships were fictitious and a scheme of evasion, the prosecution sought to show that the money derived from the partnerships actually wound up in appellant's hands. Analysis by Special Agent Filice (Tr. 1652-83) showed some of the money going into appellant's personal bank account, although, all in all, it appeared that appellant disbursed for the account of his children just about as much money as came into his hands representing their share of partnership profits (Tr. 1741). It appeared, however, that the proceeds from the largest partnership operation, namely, the Admay Company, did not go to appellant but went to the Gerdon Land Co., from which corporation the Admay Company partnership leased certain properties for operation. The receipt of these proceeds by the Gerdon Land Co. appeared on the corporate books of Gerdon Land Co., and in particular, in that portion of the general ledger entitled Accounts Payable No. 20 (see Exh. 56, 56a and 56b). In an attempt to show that the balance of the aforementioned Accounts Payable No. 20 actually repre-

sented a liability of the corporation to appellant and that, therefore, appellant owned this obligation, the Government produced testimony from appellant's accountant William A. Wallace (Tr. 1124-25) to the effect that the moneys represented by the account were owed by the Gerdon Land Co. to one person only, and that person was appellant. Wallace admitted on cross-examination (Tr. 1298, et seq.) to having given different testimony on the first trial of the case. In addition, the Revenue Agent Wiley identified Accounts Payable No. 20 with appellant (Tr. 380-479). As a final and concluding step to the theory of proof, the prosecution introduced in evidence, over appellant's objections, certain cancelled checks of Gerdon Land Co. delivered and payable to the order of appellant in the years 1946 and 1947, and after the year of indictment, all involving substantial sums of money.

The troublesome and confusing nature of family partnerships in the law of income taxation appears from the Government's own evidence. The particular partnerships in which appellant was involved were admittedly subjects of discussions between Revenue Agent Wiley, who in 1946 began an audit of appellant's tax affairs from the years 1942 through 1945, and William A. Wallace who appeared as appellant's tax consultant (Tr. 459-1261). Wiley admitted that the partnership question was a troublesome and confusing one. Wallace testified that Wiley had suggested a single family partnership for appellant (eventually reflected in Exh. 63), an idea which Wallace frankly admitted did not originate with appellant at all. In

connection with this testimony, and over appellant's objections, the prosecution were permitted to ask Wallace a number of questions referring to a previous sworn statement he had given the Intelligence Unit, the apparent purpose of which inquiry appears in the record to be an attempt by the Government to impeach its own witness (Tr. 1415, et seq.).

The Wai Yuen gambling club.

Appellant's gambling activities were conducted under the fictitious name of Wai Yuen Club. The existence and nature of the operation of this club was known to the Government for several years. Partnership returns of income filed by appellant in earlier years contained the words "house of games" as a description of the business (see Exh. 48-49). The Wai Yuen Club is referred to in Exhibit 58 relied upon by the Government as its net worth starting point. Substantial income from the Wai Yuen Club appears on all of the individual returns of income of appellant and his wife for the years 1942 through 1945, said returns in the year 1945 showing the following: From Wai Yuen, Wai Hung and Wai Lee Companies, $44,446.76 (see Exh. 1).

Books of account for the Wai Yuen Club were kept by appellant's accountant David Shew who testified as a witness for the Government.

Mr. Shew kept the Wai Yuen books from 1942 or 1943 until 1945 or 1946 (Tr. 756), although he had first been employed by appellant either in 1939 or 1940. These books of account were introduced in evi-

dence by the Government (Exh. 184, 184a). Profit and loss statements were prepared by Shew from year to year for the gambling activities (Exh. 60, Tr. 768), which were then sent to appellant's accountant Wallace for incorporation in appellant's tax returns.

Actually, the club had various locations depending upon the vicissitudes of law enforcement (Tr. 880).

In connection with the gambling club, the Government introduced evidence through the witness Shew that during the year 1945 appellant had paid certain bonuses to six of his employees in the club, totalling $25,000, claiming that the bonuses were in fact fictitious. The Government's proof in this respect was directed actually to the disallowance of a business deduction claimed to be improper and through the testimony of the witness Shew involved a long, sometimes confusing, and frequently inconsistent series of evidentiary facts having to do not only with the bonus transaction itself but with the charge that appellant employed Shew to prepare the individual returns of the bonus recipients and also paid the income tax of such recipients. Accordingly, in the year 1945, the Government listed the above $25,000 as a specific item of omission in Exhibit 334, its list of omissions under its first method of proof. However, with the exception of the above, there was no direct evidence anywhere in the record that appellant failed to report the entire income from his gambling club.

The Wai Yuen Club was raided by the San Francisco Police Department on February 4, 1945, while it was occupying the premises known as The Palms,

at which time the authorities seized currency and silver dollars in the total sum of $42,259.40 plus an estimated $5000.00 in small coins, making a total of $47,259.40 (Tr. 168-173). This amount was taken into account by appellant in his net worth analysis (Exh. DD) as the bank roll of the club at December 31, 1944, but was not similarly treated by the Government in its net worth analysis (Exh. 339). Shew, who was familiar with the books of account of the gambling club, testified that the club was closed during the last three months of the year 1945 (Tr. 914). This was confirmed by the absence of entries for transportation expenses in the books of the club (Exh. 184) during this time, the club having functioned on a basis of transporting its patrons to its premises by limousine. Despite this evidence and in the absence of any evidence as to the existence of a bank roll at the end of the year, the Government carried the same $50,000 as an existing bank roll of cash on hand at December 31, 1945 (see Exh. 339).

The net worth case.

The prosecution's net worth analysis of appellant and his wife is found in detail in Exhibits 280-4, 286, 337-346. It is hoped that reference to these exhibits may shorten this statement of the case. Of the foregoing, Exhibits 337, 339, 340 and 342 constitute principal statistical summaries, the balance of the exhibits being of a subsidiary character. In Exhibits 337 and 339, assets and liabilities are assembled to arrive at net worth computations as follows: At December 31, 1941 (the "starting point"), $323,255.94;

at December 31, 1944 (the "opening net worth" for the year under indictment), $886,473.37; at December 31, 1945 (the "closing net worth"), $1,115,155.04. In Exhibit 342, calculations of understatement of income based on an increase in net worth plus nondeductible expenditures and minus nontaxable income result in a figure of $216,572.73 for 1945, the year under indictment. Similar calculations in Exhibit 340, give a figure of $559,502.77 for the period 1942-1944.

The above exhibits were prepared by, and introduced in evidence during the testimony of the witness Augustus V. Brady, technical adviser assigned to the Penal Division of the Bureau of Internal Revenue, over appellant's objections (Tr. 1802-26).

Although Brady stated that the data which he thus summarized was "secured from evidence given at this trial" (Tr. 1801), he admitted on cross-examination that the basis for the inclusion of every item on the various charts was a direction to him by the prosecuting attorney (Tr. 1872). Although he "felt they were in accordance with accounting principles" (Tr. 1874), it appears that in instances he was "not taking responsibility for these figures" but merely doing what the prosecuting attorney told him to do (Tr. 1877, 1883). The strong resistance of the prosecuting attorney to appellant's inquiries into this aspect of the charts (prosecution's objections were overruled by the Court) is significant (Tr. 1872-5).

As a result, many entries on the charts represented assumptions of Brady for which there was no basis in the evidence. All bank accounts (the balances but

not the ownership of which had been agreed upon in Exhibit 311) were charged to appellant in Exhibit 345, and carried over into Exhibits 337 and 339, although some of them were in the names of appellant's children (Tr. 1879), and although in respect to other items the interests of children had been excluded (Tr. 1880-1). Although the charts included assets carried in the name of appellant's children (Tr. 1882), it was obvious that no attempt was made to include all the assets of the children (Tr. 1883). Brady admitted that he had not taken into account in the charts several assets identified in appellant's tax returns (Tr. 1884-1891). This had a direct bearing on appellant's opening net worth.

A comparison of the prosecution's net worth analysis for the indictment year (Exh. 339) with that of the defense (Exh. DD) will show that for all practical purposes no issue arose with respect to seventeen items of assets or with respect to any liability item. The major difference between the two analyses existed in the items representing cash on hand, miscellaneous deposits and the Wai Yuen Club and its bank roll. The difference in the cash and deposits items arises out of the Howard and Evelyn Lee Chang trustee account transactions and represents an addition of $100,000 to appellant's closing net worth and thus to his reconstructed income. The difference in the Wai Yuen Club items revolves about a closing bank roll of $50,000 and the failure of the prosecution to take into account liabilities of $21,219.80. If these two items totalling $171,219.80 were in error and had no basis in evidentiary data, the admission of the

charts was gross error. We shall treat each of these matters under separate headings.

The net worth case—Chang trustee account.

Mr. and Mrs. Chang maintained a trustee account at the Pacific National Bank in San Francisco. It was identified by one Clarke, an official of the bank (Tr. 1456). The witness Evelyn Lee Chang testified the account was opened "as a trusteeship" for one C. C. Wong and in her husband's absence and Wong's absence, she was to take instructions from appellant (Tr. 1496). Signature and ledger cards of the account (Exh. 230 and 239) were admitted in evidence over objection (Tr. 1494-5). The account was opened with a deposit of currency in the sum of $30,000 (Tr. 1458), which was not traceable to appellant. At the request of appellant, Mrs. Chang drew $12,500 from the account in the form of a cashier's check which she delivered to appellant. This was charged to appellant's closing net worth as a deposit on "The Quarry" (see Exh. 338). The balance of $17,500 in the account at December 31, 1945, was also charged to appellant (see Exhibit 278). On January 3, 1946, appellant delivered $70,000 currency to Mrs. Chang which she deposited in the account (Tr. 1498) at the same time drawing a check of $84,000 to a title company (Exh. 235). The prosecution also charged the above $70,000 to appellant as cash in hand at December 31, 1945 (see Exh. 278). The net effect of all this was to add $100,000 to the income of appellant reconstructed on a net worth basis.

The net worth case—Wai Yuen Club.

The prosecution supplied the background for this through the testimony of the witness George Gibbons, who testified to his trips to a number of places where, according to the prosecution's theory, gambling operations were being conducted by appellant in 1945. His testimony on direct examination was vague and rambling (Tr. 194-203). On cross-examination he refused to state positively he went to Watsonville, Alviso and Bakersfield in 1945 (Tr. 213-4). He testified that he went to 3600 San Pablo Avenue but did not pick up or deliver any money (Tr. 201-2) and that he never visited the Hollywood Club (Tr. 206). There was no testimony of any gambling being conducted at any of these five places. A motion to strike this evidence, made orally (Tr. 1944), was denied (Tr. 1948).

The prosecution's witness Augustus Brady included all of the above and other places in his net worth analysis (Exh. 339) as gambling clubs, upon the basis of Gibbons' testimony, although he could point to no justification in the evidence, stating he made the entries pursuant to instructions of the prosecuting attorney (Tr. 1894-1903). Brady also included in Exhibit 339 an opening and closing item of $50,000 as bank roll or "cash for above clubs". He admitted that he was instructed to do this by the prosecuting attorney (Tr. 1896). He could find no justification for this in the evidence. The Overstreet testimony to which Brady referred in his chart (Exh. 339) pertained to the Wai Yuen cash in the sum of $47,259.40

seized by the authorities in a raid on the Wai Yuen Club on February 4, 1945. There was no evidence of the existence of a bank roll at December 31, 1945. The Wai Yuen Club was closed during the last three months of 1945 (Tr. 914). Finally, Brady did not take into account an increase of liabilities of the Wai Yuen Club of $16,000 during the year 1945, together with a liability for withholding tax in the sum of $5219.80, all of which appeared in the prosecution's own evidence (see Exh. 186—Balance Sheet as of December 31, 1945).

The charge to the jury.

In its charge to the jury, the Court gave certain instructions to which appellant duly objected (Tr. 2099, et seq.). The Court also failed to give certain instructions requested by appellant to which failure appellant duly objected (Tr. 2106, et seq.). Several of these (Nos. 45-55) pertained to the so-called net worth-expenditures method of proof.

SPECIFICATION OF ERRORS.

Specification No. 1.

The Court erred in denying appellant's written motion (Tr. 15) made at the conclusion of the Government's case in chief (Tr. 1944, 1948) to strike the testimony of the witness William A. Wallace, given on direct examination, in respect to twenty partnership returns of income, which said witness had been employed and paid by appellant to prepare, that he had

received instructions from appellant to report on said returns the division of income into partners shares, the said witness further testifying on cross-examination (Tr. 1294) that he did not personnally receive any information about the partners shares from appellant and was not present on any occasion when it was received by any one else, appellant's grounds for said motion and objection to the admission and retention of said evidence and which the Court denied being "that such testimony is incompetent, conclusions and opinions of the witness and hearsay" (Tr. 15).

Specification No. 2.

The Court erred in denying appellant's oral motion, made during the redirect examination of the witness William A. Wallace (Tr. 1410-11), to strike the testimony of said witness given on such redirect examination, in respect to the 1945 partnership return of income of the Admay Co. (Exh. 13) that the distribution of partnership income on said tax return came from appellant since "it is usually the procedure to have Mr. Chin indicate who the partners are", although said witness stated he did not talk with appellant personally, appellant's grounds for said motion and objection to the admission and retention of said evidence and which the Court denied being that the testimony was "speculative, and hearsay as to the defendant, irrelevant and immaterial in this case" (Tr. 1410-11).

Specification No. 3.

The Court erred in denying appellant's written motion (Tr. 15) made at the conclusion of the Government's case in chief (Tr. 1944, 1948) to strike the testimony of the witness William A. Wallace given on direct examination, in respect to four 1945 individual returns of income for four of appellant's children, which said witness had been employed and paid by appellant to prepare, that he had received from appellant information and instructions as to the income to be reported on said returns (excepting farm, professional and salary items) (Tr. 1109-17), the said witness further testifying on cross-examination (Tr. 1290-93) that he did not personally receive any information or instructions from appellant with respect to such items of income and was not present on any occasion when information or instructions were received by anyone else, appellant's grounds for said motion and objection to the admission and retention of said evidence and which the Court denied being "that such testimony is incompetent, conclusions and opinions of the witness and hearsay" (Tr. 15).

Specification No. 4.

The Court erred in denying appellant's oral motion made during the redirect examination of the witness William A. Wallace (Tr. 1412) to strike the testimony of said witness given on such redirect examination, in respect to the 1945 individual return of income of appellant's son (Exh. 23), that a deduction for depreciation taken thereon, "was evidently directed to Mr

Peffers when he prepared the return", although said witness admitted not having "any direct knowledge", appellant's grounds for said motion and objection to the admission and retention of said evidence, and which the Court denied, being "hearsay as to the defendant, speculative" (Tr. 1412).

Specification No. 5.

The Court erred in denying appellant's oral motion made during the redirect examination of the witness William A. Wallace (Tr. 1413) to strike the testimony of said witness given on such redirect examination, in respect to the 1945 partnership return of income of the Admay Co. (Exhibit 20), that a deduction for depreciation taken thereon "was directed apparently by Mr. Chin to our Mr. Peffers", the witness stating "nobody directed me personally", appellants grounds for said motion and objection to the admission and retention of said evidence, and which the Court denied, being that such testimony was "a conclusion and opinion of the witness and hearsay as to the defendant" (Tr. 1413).

Specification No. 6.

The Court erred, during the direct and redirect examination of the witness William A. Wallace, in admitting in evidence, over appellant's objections, and in refusing to strike, testimony of the witness that a certain Accounts Payable No. 20 on the books of the Gerdon Land Co. represented a liability to one person who was appellant, appellant's objections to the ad-

mission of such evidence and which the Court overruled, being that "the books are the best evidence. It calls for the conclusion and opinion of the witness" and the appellant's grounds for said motion and objection to the admission and retention of such evidence and which motion the Court denied being: "One, it is the conclusion and opinion of the witness; second, it is hearsay" (Tr. 1124-5; 1366-67).

Specification No. 7.

The Court erred, during the direct and redirect examination of the witness James L. Wiley, in admitting in evidence, over appellant's objections, testimony of the witness that he identified Accounts Payable No. 20 on the books of the Gerdon Land Co. with, and in his report "attributed" said account to, appellant, appellant's objections to the admission of such evidence and which the Court overruled being that "it calls for an opinion and conclusion of the witness" and "the books are the best evidence as to whether they identify themselves with the defendant" and that the aforesaid report "is hearsay, not binding on this defendant" (Tr. 379-81; 478-9).

Specification No. 8.

The Court erred, during the direct examination of the witness Liston O. Allen, in admitting in evidence certain cancelled checks of the Gerdon Land Co., payable to the order of appellant (Exh. 92-95, 247-8) appellants objection to the admission of such evidence, and which the Court overruled being that such exhibits

were "irrelevant and immaterial, not within or connected up with the issues of this case, pertains to the year 1946" (Tr. 683, 684, 686, 687, 688), "incompetent, irrelevant and immaterial, not binding upon this defendant, not within the issues of this case or connected up with the issues of this case" (Tr. 690).

Specification No. 9.

The Court erred, during the redirect examination of the witness William A. Wallace, in permitting the prosecution to impeach its own witness by interrogating said witness in respect to excerpts from a prior sworn statement given by him to the Intelligence Unit, the substance of which excerpts being that Wallace had had no discussions about the filing of a certain partnership return of income in 1946 and was not consulted about the income tax problems pertaining to said return, Wallace having testified previously thereto on cross-examination (Tr. 1261) that he had had conferences with a revenue agent and had thereafter consulted with appellant about a 1946 partnership return of income, appellant's objections to the admission of such evidence and which the Court overruled, being "that it is an attempt by the Government to impeach their own witness, and that no proper or adequate foundation has been laid" (Tr. 1415-20).

Specification No. 10.

The Court erred, during the direct examination of the witness Evelyn Lee Chang in admitting in evidence over appellant's objection, and in denying appellant's written motion (Tr. 16) made at the con-

clusion of the Government's case in chief (Tr. 1944, 1948) to strike, certain documents pertaining to transactions had in respect to a bank account of the witness and her husband at the Pacific National Bank (Exh. 163, 230-35, 239-41 incl. and 243) purporting to include transactions had in respect to the purchase of property located at 5000 Broadway, Oakland, and further in denying appellant's above motion to strike the testimony of said witness given on direct examination in connection with said exhibits and the transactions relating thereto, appellant's objection to the admission of such evidence, and grounds for said motion being that all of the same is "irrelevant, immaterial and not within or connected up with the issues of this case" (Tr. 16, 1494-1502).

Specification No. 11.

The Court erred in denying appellant's written motion (Tr. 16) made at the conclusion of the Government's case in chief (1944, 48) to strike the testimony of the witness L. F. Clarke, given on direct examination, pertaining to the Pacific National Bank Trustee Account of Howard and Evelyn Lee Chang, appellant's grounds for said motion and objection to the admission and retention of such evidence being that it is "irrelevant, immaterial and not within or connected up with the issues of this case" (Tr. 16, 1457-1461).

Specification No. 12.

The Court erred in denying appellant's written motion (Tr. 15-16) made at the conclusion of the Gov-

ernment's case in chief (Tr. 1944, 1948) to strike the testimony of the witnesses Dana E. Bremner, Leon C. Banker and Norman Ogilvie in respect to the purchase, financing and escrowing of the property located at 5000 Broadway, Oakland, appellant's grounds for said motion and objection to the admission and retention of such evidence being that it is "irrelevant, immaterial, and not within or connected up with the issues of this case" (Tr. 15-16; 238-246; 704-706; 720-723).

Specification No. 13.

The Court erred in denying appellant's oral motion made at the conclusion of the Government's case in chief (Tr. 1944, 1948) to strike the testimony of the witness George Gibbons, given on direct examination that said witness made certain trips at appellant's direction to Watsonville, Bakersfield, Alviso, Yosemite Club, Hollywood Club, 3600 San Pablo Ave. and The Palms, appellant's grounds for such motion and objection to the admission and retention of said evidence, and which the Court overruled, being that "such evidence is irrelevant and immaterial and has not been connected up with the issues of this case, and in form vague and speculative, and of such a character as to have no probative value in this case" (Tr. 1944-5; 1948; 194-203).

Specification No. 14.

The Court erred, during the direct examination of the witness Augustus V. Brady in admitting in evi-

dence over appellant's objection, and in refusing to strike (Tr. 17, 1944, 1948), Government's Exhibits 280-82 incl., 337-342 incl., 344, 345 and 347, and in admitting in evidence, over appellant's objection the testimony of said witness in purported explanation and elaboration of said exhibits, appellant's objection to the admission of such evidence and which the Court overruled being that "the document is improper and should not be admitted because it is based upon assumptions of fact or inferences from facts which are not in evidence" and "that this document is incompetent, irrelevant and immaterial, prejudicial, and basis for improper examination of the witness". The above objection was made to Exhibit 337, the first of said exhibits offered, the court permitting appellant's counsel to make the same objection by reference, upon the offer of the remaining exhibits above mentioned, as well as to the testimony of the witness pertaining thereto (Tr. 1802-47).

Specification No. 15.

The Court charged the jury as follows (Tr. 2082):

> "You are instructed that when in a trial on charges of income tax evasion discrepancies between the defendant's returns and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict."

This was instruction No. 5 as requested by the Government (Tr. 23), to which counsel for the appellant

made timely objection (Tr. 2099), stating the following grounds (Tr. 2100):

> "With respect to Instruction No. 5, that such instruction omits language from the case noted in support thereof to the effect that the burden of proof in the criminal case is always on the Government and never shifts. Furthermore, the giving of such instruction in its present form would permit the jury to draw an unfavorable inference from the defendant's failure to testify in the case at bar * * * "

Specification No. 16.

The Court refused to charge the jury in accordance with the appellant's requested instructions Nos. 45 through 55 (Tr. 64-72), except that a portion of No. 53 was given pertaining to the net worth-expenditures method of establishing taxable income. These instructions, for convenience, are set forth in the Appendix hereto at p. x et seq.

The appellant made timely objection to the court's refusal (Tr. 2106), stating the following grounds (Tr. 2107):

> "With respect to requested instructions Nos. 44 through 55, the additional specification is made that the omission from the charge to the jury of each of said instructions leave the jury without a full, clear or accurate instruction upon the legal principles pertaining to the so-called net worth expenditures method of computing income.
>
> "The jury cannot rely upon the testimony of witnesses for an explanation of the legal criteria on this subject, and cannot resort to the testimony

of accountants for the standards of law. Net worth expenditures evidence is circumstantial evidence and the jury must be instructed upon the pertinent legal principles so that such instruction can be coordinated with the general instructions on circumstantial evidence.

"The jury must be instructed on the type and quantum of proof required by the net worth expenditures method under law, so that it can apply such principles in following the Court's charge on the reasonable hypothesis doctrine. The Court must point out to the jury in its charge, the legal principle that at no time under the net worth expenditures method does the burden of proof from the Government, nor is it altered or changed in any way.

"The Court must, we respectfully urge, instruct the jury upon the legal standards pertaining to the important factors of this net worth, among which are: the starting point, the opening net worth, the increase, and other factors as set forth in the proposed requested instructions of the defendant."

Specification No. 17.

The Court charged the jury as follows (Tr. 2082):

"The possession of money alone is not sufficient to establish net taxable income. That evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income."

This was instruction No. 4 as requested by the Government (Tr. 23), to which counsel for the appellant

made timely objection (Tr. 2099), stating the following grounds (Tr. 2100):

> "With respect to Instruction No. 4, the second sentence thereof is not a correct statement of law and is not supported by legal authorities, and the instruction does not specify the chain of circumstances referred to therein."

Specification No. 18.

The Court charged the jury as follows (Tr. 2087):

> "Evidence has been admitted in the trial of this case as to the practice of gambling during the year 1945 on the premises controlled by defendant, and evidence has been admitted that the defendant received income from the practice of gambling during 1945 on which he paid no tax.
>
> "Such evidence, if believed, may be considered by you only for the limited purposes of showing that defendant had a source of income from an illegal business which he concealed from the tax authorities. It may be considered by you to show that the defendant had a plan or scheme of operation in prior years resulting in income to the defendant continuing over to and similar to that used in 1945, and to show the intent of the defendant to defraud the Government of income taxes during the year 1945."

This was instruction No. 29 as requested by the Government (Tr. 31), to which counsel for the appellant made timely objection (Tr. 2099), stating the following grounds (Tr. 2101-2102):

> "With respect to Instruction No. 29, the first paragraph of said instruction is not based upon

the evidence in the record, and the second paragraph of said instruction is not logically related to or connected with the first paragraph. Furthermore, such instruction is generally ambiguous and confusing and does not accurately set forth the law."

Specification No. 19.

The Court charged the jury as follows (Tr. 2089-2090):

"The word 'wilful' when used in a criminal statute generally means an act done with a bad purpose; without justifiable excuse; or stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether one has the right so to act."

This was instruction No. 49 as requested by the Government (Tr. 35), to which counsel for the appellant made timely objection (Tr. 2099), stating the following ground (Tr. 2102-2103):

"With respect to Instruction No. 49, upon the ground that the last sentence of said instruction does not accurately state the law."

Specification No. 20.

The Court charged the jury as follows (Tr. 2083):

"The duty to file the return is personal, and it cannot be delegated. Bona fide mistakes should not be treated as false and fraudulent, but no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the

correctness of the statement which he files, whether prepared by him or prepared by somebody else."

This was instruction No. 10 as requested by the Government (Tr. 25), to which counsel for the appellant made timely objection (Tr. 2099), stating the following ground (Tr. 2100-2101):

"With respect to Instruction No. 10, said instruction sets up an improper standard of conduct, namely, standard of 'good faith and ordinary diligence' as the 'responsibility' of every person who can read and write. Failure to conform to such standard does not necessarily constitute a crime."

Specification No. 21.

The Court erred in denying appellant's motion for a new trial (Tr. 76, 82).

ARGUMENT.

I. INSTRUCTIONS TO JURY, GIVEN AND REFUSED.

It is our contention that the trial Court committed a number of errors in giving certain instructions to the jury, over the appellant's objections, in refusing to give certain instructions requested by the appellant, and in giving instructions which as a whole were unbalanced, and that these errors were highly prejudicial to the appellant.

1. **The Court erred to the prejudice of the appellant in instructing the jury that the failure of the defendant to offer explanation of the Government's evidence might be considered by the jury in arriving at their verdict** (Specification No. 15).

The Court charged the jury as follows (Tr. 2082):

> "You are instructed that when in a trial on charges of income tax evasion discrepancies between the defendant's returns and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict."

To this instruction, which was No. 5 as requested by the Government (Tr. 23), counsel for the appellant made timely objection, specifically stating his grounds therefor, including the ground that the instruction "would permit the jury to draw an unfavorable inference from the defendant's failure to testify" (Tr. 2100).

The giving of this instruction, we submit, was a serious violation of the fundamental rights secured to the appellant by federal statute and by the Fifth Amendment to the Constitution.

The Fifth Amendment provides, in part, that "No person * * * shall be compelled in any criminal case to be a witness against himself * * *" (U.S.C.A., Const. Amend. 5). This language, of course, embodies the traditional privilege against self-incrimination as developed in the common law. *Wigmore on Evidence,* 3rd Ed., vol. 8, Sec. 2252.

The statute involved is Section 3481 of Title 18, U.S.C.A., formerly Section 632 of Title 28, U.S.C.A.

(Act of March 16, 1878, 20 Stat. at L. 30, chap. 37), and it provides as follows:

> "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in court martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

This statute was enacted in substantially its present form in 1878 for the purpose of removing the common law disability of the accused from testifying in his own defense. But it goes beyond that purpose. Not only does it confer testimonial competency upon the accused, but also, it gives assurance that no presumption shall arise against him from his failure to testify. Thus, if the accused elects not to exercise his privilege to testify, but instead, relies upon his constitutional privilege against self-incrimination, the statute expressly declares that he shall suffer no adadverse inference from his exercise of the latter privilege. As aptly stated by the Supreme Court, "But Congress coupled his privilege to be a witness with the right to have a failure to exercise the privilege not tell against him." *Bruno v. United States* (1939), 308 U.S. 287, 292, 60 S. Ct. 198, 84 L.Ed. 257, 260.

Apart from the statute, it is our contention that the Fifth Amendment likewise protects the accused from any unfavorable inference which might arise from

his failure to testify. While the amendment does not say this in so many words, as does the statute, it seemingly affords the same protection to the accused by necessary implication. The reasoning in support of such view is well stated by Justice Murphy in his dissenting opinion in *Adamson v. California* (1947), 332 U.S. 46, 124, 67 S.Ct. 1672, 91 L.Ed. 1903, 1947, 171 A.L.R. 1223, as follows:

> "If he does not take the stand, his silence is used as the basis for drawing unfavorable inferences against him as to matters which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself. And silence can be as effective in this situation as oral statements."

The question whether the Fifth Amendment in this respect affords the same protection as the statute has apparently never been passed upon by the Supreme Court. In light of the statute the question may never arise, and it would seem to be academic insofar as the present case is concerned. Before leaving the matter, however, we wish to make further reference to the *Adamson* case, supra.

In that case the Court was called upon to consider the validity of an amendment to the Constitution of the State of California, adopted in 1934, which provided that "in any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the Court and by counsel, and may be considered by the Court or the

jury * * *"* In holding that this provision was not proscribed by the Fourteenth Amendment, the majority of the Court said (322 U.S. 50-51):

> "We shall assume, but without any intention thereby of ruling upon the issue, that permission by law to the court, counsel and jury to comment upon and consider the failure of defendant 'to explain or to deny by his testimony any evidence or facts in the case against him' would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. Such an assumption does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment against state action * * *"

In a concurring opinion, Justice Frankfurter said (322 U.S. 61):

> "For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress (March 16, 1878) 20 Stat 30, c 37, 28 U.S.C.A. § 632, 8 FCA

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*California is one of the few States which permit an adverse inference to be drawn from the failure of the accused to testify. "Generally, comment on the failure of the accused to testify is forbidden in American jurisdictions . . ." *Adamson v. California,* supra, 322 U.S. 46, 55; see, also, *Wigmore on Evidence,* supra, Sec. 2272.

title 28, § 632; see *Bruno v. United States,* 308 US 287, 84 L ed 257, 60 S Ct 198."

Two of the four dissenting justices (Black and Douglas) adopted the same assumption as the majority with reference to the scope of the Fifth Amendment (322 U.S. 69), and the other two dissenting justices (Murphy and Rutledge) declared flatly that "this guarantee against self-incrimination has been violated in this case" (322 U.S. 124-125).

Thus all of the justices in the *Adamson* case either assumed or held that the amendment to the State Constitution infringed upon the defendant's privilege against self-incrimination under the Fifth Amendment.

Whether or not the Fifth Amendment prevents the drawing of an adverse inference from the fact that the privilege against self-incrimination is claimed, the statute itself is explicit. It restrains both the Court and the prosecutor from making any comment upon the failure of the accused to testify. *Wilson v. United States* (1893), 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650; *Johnson v. United States* (1942), 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704; see also, *Adamson v. California,* supra, 322 U.S. 46, 50, footnote 6, 91 L.Ed. 1903, 1907. Furthermore, if the accused so requests, he is entitled to an instruction charging the jury, in line with the statute, that his failure to testify shall not create any presumption against him, and the refusal to give such an instruction is reversible error. *Bruno v. United States,* supra.

To "consider" adversely "the failure of the defendant to offer explanation", as the jury here were permitted to do, is to create a "presumption" against him, within the meaning of the statute. The broad meaning of the term "presumption", as used in the statute, is made evident by the Supreme Court's decision in the *Bruno* case, supra. In that case Bruno and others were convicted of a conspiracy to violate the narcotics laws. Some of his codefendants took the stand, but Bruno did not. The following instruction, requested by him, was refused (308 U.S. 292):

> "The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner."

The Supreme Court, in reversing the conviction, held that the defendant had "an indefeasible right to have the jury told in substance what he asked the judge to tell it" (308 U.S. 292).

It will be noted that the charge in the *Bruno* case told the jury not only that the failure of the defendant to testify does not create any "presumption" against him, but that the jury "must not permit that fact to weigh in the slightest degree" against the defendant, nor should such fact "enter into the discussions or deliberations of the jury in any manner." In effect, the jury were instructed not to "consider" for any purpose or in any manner the fact

that the defendant chose not to testify. They were admonished not even to mention such fact in their deliberations.

To read the statute, and then to read the Court's charge to the jury in the present case, is enough to demonstrate that the instruction is condemned by the statute. The statute says that the failure of the defendant to testify "shall not create any presumption against him." The jury were told that "the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict." Granting that the Court did not mean by this that the jury might base its verdict solely upon the failure of the defendant to testify—that is, entirely without regard to the Government's evidence—the instruction undoubtedly permits the jury to give greater weight to the Government's evidence because of the defendant's failure to explain or deny it, and the burden of proof rests lighter upon the shoulders of the prosecutor. Without such added weight the Government's case might fall. The jury might not be prepared to accept the Government's evidence. It might not be willing to draw from such evidence an inference unfavorable to the defendant. It might be loathe to believe that he failed to report income, or that the omission of income from his tax return was wilful, or that he had a specific intent to evade the tax. It might not be satisfied of his guilt beyond a reasonable doubt. Without such added weight, the Government's proof might not be sufficient to tip the scales. Thus by the Court's instruction, the defendant's silence is made to speak against him. By

claiming his privilege against self-incrimination, he incriminates himself.

The prejudice to the defendant inherent in this instruction is emphasized by the fact that the charge is made applicable to virtually the whole of the Government's case. The evidence which the defendant is called upon to explain, in the words of the instruction, consists of "discrepancies between the defendant's returns and his actual income", meaning all such discrepancies which the Government tried to prove by whatever method of proof. If such discrepancies are "indicated" by the Government's proof, the jury is free to convict the defendant for his failure to explain or deny such "indications", regardless of whether that proof, in and of itself, would stand the test.

In support of its proposed instruction, as given by the Court, the Government cited the case of *Bell v. United States* (1950), 4 Cir., 185 F. 2d 302, cert. den. 340 U.S. 930, 71 S.Ct. 492, 95 L.Ed 671, and it does appear that the language of the instruction was taken from the Court's opinion in that case. But the *Bell* case, as we shall show, is plainly distinguishable from the present one and lends no support whatever to the Government's position here.

In the *Bell* case the defendant, as here, was indicted under Section 145(b) of the Internal Revenue Code. The Government's case, in the language of the Court, "consisted in part of estimates of the net income of the defendant in the taxable years based upon calculations of his net worth at the beginning and end

of each year derived from available records, and also statements of the defendant to the revenue agents who investigated the case" (185 F. 2d 305). The revenue agents testified at some length regarding their conversations with the defendant, as well as with his auditor, during the course of the investigation, and the opinion of the Court makes repeated reference to such testimony. At the trial, however, the defendant did not take the stand, nor did he offer any witnesses in his behalf.

On the appeal from his conviction, the defendant questioned the sufficiency of the evidence to go to the jury, and urged, also, that "the net worth statements are insufficient in themselves to prove his guilt and that in the absence of proof of the corpus delicti, a conviction of crime may not be based solely on the confessions or admissions of the defendant" (185 F. 2d 309). In rejecting this contention, the Court said (185 F. 2d 309):

> "In this case there is substantial evidence outside of Bell's statements to indicate his guilt. It consists of the increase in his net worth during the taxable years, the absence of personal records or books of account, and the inadequacy of the corporate records to show fully either its transactions or those of the defendant; and this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through his employees either during the agent's investigation or the trial in court. It is true that the burden of proof resting upon the government does not shift during the progress of a criminal case but when in the trial of charges

> of income tax evasion discrepancies between the taxpayers' returns and his actual income are indicated by the government's proof, the failure of the defendant to offer explanation in any form may be considered by the jury in finding its verdict. In *Rossi v. U. S.,* 289 U.S. 89, 91, 53 S. Ct. 532, 533, 77 L. Ed. 1051, the court said: 'The general principle, and we think the correct one, underlying the foregoing decisions, is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which, if untrue, could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control.' See also, *Jelaza v. U. S.,* 4 Cir., 179 F. 2d 202; *U. S. v. Hornstein,* 7 Cir., 176 F. 2d 217, 220; *Bradford v. U. S.,* 5 Cir., 130 F. 2d 630."

It is at once apparent that the Court in the *Bell* case was considering, not the propriety of an instruction to the jury, but the sufficiency of the evidence. And the same is true of all of the cases cited in the above-quoted paragraph from the *Bell* case.

In the first case thus cited, *Rossi v. United States,* the defendants were convicted, in a non-jury trial, of violating the internal revenue laws by carrying on the business of a distiller without having given a bond as required by statute, and by having possession and control of a still without registering the same as required by law. The Government proved that the defendants had possession and control of the still, and that it was set up for operation in a dwelling house, but offered no affirmative evidence

to show that the defendants had failed to register the still or to give bond. The defendants did not take the stand. In holding that the evidence was sufficient to sustain the conviction, the Court called attention to another statute which prohibited the operation of a still in any dwelling house and observed that it "was impossible for petitioners lawfully to register the still or to give the required bond" (289 U.S. 91).

In the *Rossi* case, as in the *Bell* case, the Government's proof was *wholly uncontradicted,* and the Court merely held that in failing to offer any contrary evidence, the defendants must suffer whatever inferences may logically be drawn from the evidence against them.

Again in *Bradford v. United States,* likewise cited in the *Bell* case, the Court was considering the sufficiency of the evidence to support the conviction of one of the defendants, Will Bradford, who had elected not to testify. In affirming the conviction the Court said, in part (129 F. 2d 277-278):

> "These salient facts, standing out in the midst of many minor circumstances in evidence, were sufficient to require some contradictory or explanatory testimony (not necessarily by, but) in behalf of Will Bradford, or an inference of guilty knowledge reasonably could be drawn against him by the jury. The presumption of innocence is one of the strongest rebuttable presumptions known to the law, but it disappears when a verdict of guilty, supported by substantial evidence, is returned against the defendant."
>
> * * * * * * *

> "No presumption against the accused arose from his not testifying in his own behalf, but his failure to testify did not raise a presumption in his favor or enable him to avoid the consequences of fair and reasonable inferences from proven facts."

Upon petition for rehearing, the Court specifically rejected the contention that in passing upon the sufficiency of the evidence it had indulged an unfavorable inference from the failure of the defendant to testify, saying (130 F. 2d 630):

> "Notwithstanding the statements in the petition for rehearing filed on behalf of appellants, this court did not hold that an inference of guilty knowledge might be drawn against W. T. Bradford because he did not testify. Such an inference is not permissible under the law. Counsel have evidently misread our opinion in this case. No man may be compelled to be a witness against himself, but sometimes in the progress of a trial the burden of going forward with the evidence may require the accused to produce testimony for himself or suffer an inference of guilt from facts already proven to be drawn against him by the jury."

Similarly in *Jelaza v. United States* and *United States v. Hornstein,* also cited in the *Bell* case, the Courts were considering the sufficiency of the evidence. Moreover, in each of those cases the defendant had taken the stand, hence his testimony was subject to the same treatment as that of any other witness. In such cases the failure of the defendant in his testimony to explain or deny the evidence against him

which he might naturally have explained or refuted, may be considered by the Court or jury. Where the defendant elects to testify in his own behalf, he waives his privilege against self-incrimination, and the "prohibition against inferences from his failure to testify comes to an end, with the ending of the privilege." *Wigmore on Evidence, supra,* sec. 2273, p. 433, see also, *Caminetti v. United States* (1916), 242 U.S. 470, 37 S.Ct. 128, 61 L.Ed. 442.

It thus appears that the Court in the *Bell* case, in referring to "the failure of the defendant to offer explanation in any form", was discussing the sufficiency of the evidence, and that by this language the Court was merely pointing out that defendant had failed to put on evidence of any kind and that the Government's proof was uncontradicted.

Furthermore, it was possible under the circumstances of the *Bell* case, as is plainly evident from the opinion, for the defendant to furnish some explanation of the Government's evidence in a form other than his own personal testimony. As the Court observed, after adverting to the evidence "outside of Bell's statements" made to the internal revenue agent, "this body of testimony derives support from the defendant's failure to offset or explain the discrepancy *through his employees* either during the agent's investigation or the trial in court" (185 F.2d 309; emphasis ours). Such a comment was obviously proper, since it did not pertain to the personal testimony of the defendant. "The *failure to produce evidence,* in general, *other than his own testimony,* is open to in-

ference against a party accused, with the same limitations * * * applicable to civil parties." *Wigmore on Evidence,* supra, sec. 2273, p. 427. In civil cases, of course, "A party's failure to produce evidence which, if favorable, would naturally have been produced, is open to the inference that the facts were unfavorable to his cause." *Wigmore on Evidence,* supra, sec. 2273, p. 426. But this rule must yield in criminal cases wherever it comes into conflict with the privilege against self-incrimination. Hence, in such cases it applies only to the failure of the accused to produce evidence other than his own testimony or private papers. *Wigmore on Evidence,* supra, sec. 2273.

In the present case the Court's charge to the jury was not confined to any legitimate inference which might be drawn from the failure of the appellant to produce available non-privileged evidence. Nor may it be construed to mean merely that the appellant had failed to put on any evidence at all. As a matter of fact, the appellant here, unlike the defendant in the *Bell* case, did produce witnesses in his behalf, and, in addition, he introduced documentary evidence. For that reason alone the language of the instruction, while the same as that employed by the Court in the *Bell* case, cannot possibly have the same meaning. In the *Bell* case, in which the defendant produced no evidence whatever and the Court was considering the sufficiency of the evidence against him, "the failure of the defendant to offer explanation in any form" meant the failure of "the defense" to introduce evidence of any kind or character. In the present case,

in which the appellant did produce evidence, "the failure of the defendant to offer explanation in any form" can only refer to the failure of the defendant personally to take the stand. Thus the words of the *Bell* case, considered in their context, mean one thing, but when torn from their natural environment and thrust into a different one, they take on a different meaning.

Moreover, we must not lose sight of the fact that the instruction specifically refers to *the defendant.* It speaks of "the failure of the defendant to offer explanation in any form", meaning the failure of the defendant personally to offer any explanation at all. The instruction does not say "the failure of the defendant through available witnesses to offer explanation". And such a meaning may not be read into the instruction without interpolating words which are not there. Finally, it should be noted that elsewhere in the instructions the jury were given the usual charge regarding the failure of either party to call available witnesses having knowledge of the facts (Tr. 2087-2088). In light of the latter instruction, the charge regarding the failure of the defendant to offer explanation must be construed as having reference solely to the explanation of the defendant personally.

It should be mentioned that the trial Court gave the jury the following instruction (Tr. 2076), which was a portion of Defendant's Requested Instruction No. 18 (Tr. 38):

> "Now, I instruct you, ladies and gentlemen, that within his option the defendant has the right,

under the law, to be sworn as a witness in his own behalf and testify, if he so chooses, or not as he may be so advised; and, therefore, as a matter of law, you as jurors, are not entitled to draw any inferences whatsoever against the defendant because he exercised his privilege, which is accorded to him under the law, of standing upon the case made against him by the Government, without being sworn and without testifying upon his own behalf."

This instruction, we contend, was emasculated by the erroneous charge considered hereinabove. In one charge the jury are told that they may draw no inference from the defendant's failure to testify, and in the other they are told that in arriving at their verdict they may consider the failure of the defendant to explain the Government's evidence. We submit that these instructions are patently incompatible, and that in giving the erroneous charge the Court deprived the appellant of the proper one.

As we have seen, the statute (18 U.S.C.A., Sec. 3481) is mandatory, and the accused has an "indefeasible right" to have the jury instructed in conformity with it. *Bruno v. U. S.,* supra. Here the Court gave the instruction, then, in effect, took it away. This is not the full measure of protection to which the appellant was entitled under the statute. It is to be noted, further that the correct charge here was given shortly after the Court commenced its instructions to the jury, and the erroneous charge was given somewhat later. As a result the first instruction was erased and superseded by the later one.

In *United States v. Ward* (1948), 3 Cir., 168 F.2d 226, three defendants were convicted on charges of defrauding the Government. In reversing the convictions the Court held, in part, as follows (pp. 227-228):

> "In the course of his charge the Trial Judge commented upon the failure of the defendants to take the stand in their own behalf. He said: 'That is another one of their rights as free Americans,—nobody can compel them; they can elect to rest their case without offering that much testimony (snap) and no inference of guilt can be drawn from that fact, that they did not take the stand * * *.'
>
> "Then the Judge went on to say: 'but, by the same token, you can weigh in your mind the fact that they did not with everything else heretofore said to satisfy you of their guilt.' We do not see how any jury could hear this part of a charge or how an appellate court could read it without coming to the conclusion that what the learned Trial Judge told the jury was that defendant did not have to offer any proof of his innocence but that if he did not take the stand the jury could consider that fact along with the prosecution's testimony upon the question of the defendant's guilt. Such a proposition of law is so clearly contrary to the authority in the federal cases that we need do no more than cite former adjudications in which the rule laid down is contrary to that contained in the excerpt from the charge above quoted. *Bruno v. United States,* 1939, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257; *Wilson v. United States,* 1893, 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650; see *Johnson v. United States,* 1943, 318 U.S. 189, 195-199, 63 S.Ct. 549, 87 L.Ed. 704.

> "Counsel for the defendants seem to have missed this point completely and only bring it to us upon appeal in connection with a matter of less importance. But the language is there in the charge and we know it is there and it seems to us one of those misstatements of law into which all of us sometimes fall. It is, likewise, of substantial importance on the defendants' rights. Ordinarily, unless one complains of a proposition in a charge and gives the Trial Judge a chance to correct it, the reviewing court will not examine the legal accuracy thereof. But the error here is not mere inaccuracy but one 'affecting substantial rights' and the omission of counsel to note it does not relieve this Court of its responsibility to do so."

In the *Ward* case, as here, the Court gave an instruction under the statute then, in effect, destroyed it. Cf. *Cummings v. Pennsylvania R. Co.* (1930), 2 Cir., 45 F.2d 152. And the error was held to be so grievous that the convictions were reversed on appeal despite the failure of counsel for the defendants to make any objection to the charge in the trial Court. In the present case, as mentioned hereinabove, counsel for the defendant made timely objection to the charge, specifically stating the ground that the instruction "would permit the jury to draw an unfavorable inference from the defendant's failure to testify" (Tr. 2100). The trial Court, nevertheless, refused to give a curative instruction, and made no effort to clarify the apparent conflict in the instructions given. Under the circumstances, it is our position that this Court should not hesitate to reverse the conviction in this case.

In *Langford v. United States* (1949), 9 Cir., 178 F.2d 48, this Court had occasion to consider the effect of the statute (18 U.S.C.A., Sec. 3481) as applied to certain improper remarks made by the prosecutor in his argument to the jury. In affirming a judgment of conviction, the Court was of the opinion (1) that the remarks of counsel were not made in such manner "as would be likely to lead the jury to draw improper inferences" (p. 55); (2) that the Court had, in effect, instructed the jury to disregard such remarks; and (3) that "any error in this respect could be, and was, waived by the failure of defendant's counsel to object" (p. 55).

In contrast to the *Langford* case, we have here a case in which (1) the instruction of the Court was avowedly intended to permit the jury to draw improper inferences; (2) the Court made no pretense of correcting the erroneous instruction; and (3) counsel for the appellant made timely and pointed objection to the Court's charge. As applied to the present situation, the reasoning of the Court in the *Langford* case would seem clearly to require a reversal.

It is important to note, also, that the trial Court in the *Langford* case give the jury an instruction regarding the defendant's failure to testify. That instruction, to which counsel for the defendant made no objection, fell short of the standard set in the *Bruno* case, supra. As this Court said (p. 54):

> "* * * The general import of the instruction given was that defendant's failure to testify cannot supply anything lacking in the government's

> case. There remains the possibility that the jury, in obedience to the instruction, might require the government to furnish proof of every essential fact, and still consider that the failure of defendant to testify added weight to such proof."

This Court then went on to say, significantly, that (p. 55) "Had defendant saved the point by proper objection the instructions given would not have cured the error"—that is, the error resulting from the prosecutor's improper remarks to the jury. In the present case, as we have observed, the appellant's point was saved by proper objection, and the Court made no effort whatever to "cure" the error.

The fact that the trial Court here had previously given the jury a proper instruction under the statute affords no consolation to the appellant and no legal justification for the wrongful charge. This is not a case in which the judge or the prosecutor says the wrong thing and then the judge tries to make amends. Here the right charge came first and the wrong charge followed somewhat later. If either of these two conflicting instructions were to be regarded as corrective or amendatory, the last one, as a matter of logic, would prevail.

It is entirely possible that a jury, in the present situation, would attempt to reconcile the two instructions by taking the view that despite the broad admonition contained in the first one—which stated in general terms that the jury were not entitled to draw any inferences against the defendant because of his failure to testify—they might, nevertheless, in a case where

discrepancies between the defendant's returns and his actual income are indicated by the Government's proof, consider that the failure of the defendant to offer explanation "added weight to such proof". *Langford v. United States,* supra, at p. 54. At best, the jury "were left to take its choice between two inconsistent statements of the law, one of which was wrong, and one right." *Cummings v. Pennsylvania R. Co.,* supra, at p. 153. In any event the present case stands as if the first and proper charge had, though requested, never been given.

If the trial Court had refused to give the instruction requested by the appellant, a reversal would be inevitable. *Bruno v. United States,* supra. That, in effect, is what the Court did. If the appellant had an "indefeasible right" to a full and unfettered instruction in line with the statute, he had, we contend, an equal right not to have the Court give an instruction in derogation of the statute. And that, precisely, is what the Court did.

As the Supreme Court has said, "Where the departure is from a constitutional norm or a specific command of Congress", a reversal would seem to be the only means for preventing a deprivation of such fundamental rights. *Kotteakos v. United States* (1946), 328 U.S. 750, 764-765; 66 S. Ct. 1239, 90 L. Ed. 1557, 1566; see also, *Screws v. United States* (1945), 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed. 1495, 1506.

2. **The Court erred to the prejudice of the appellant in failing to instruct the jury as to the legal norms applicable to the net worth-expenditures method of establishing taxable income** (Specification No. 16).

As noted hereinabove, one of the methods of proof by which the prosecution sought to establish its case was the so-called net worth-expenditures method. On this issue the Court charged the jury as follows (Tr. 2080):

> "We have heard a great deal about net worth during the trial of this case. The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods, can reasonably be accepted as accurate."

The last sentence of this instruction was a portion of appellant's requested instruction No. 53 (Tr. 70; see Appendix hereto, p. xvii), which was based upon *United States v. Fenwick* (1949), 7 Cir., 177 F.2d 488, 491. In the requested charge the portion thus given by the Court was preceded by the following:

> "* * * when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived * * *"

As the trial Court observed, the jury "heard a great deal about net worth" (Tr. 2080) during the

trial. The evidence on this issue was voluminous, and much of it was complicated. It is our contention that the appellant was entitled to have the jury fully instructed as to the established legal criteria applicable to the net worth-expenditures method of proof. The instructions proposed by the appellant covered all aspects of this issue and were supported by citations of authority. All were refused except the single sentence from No. 53 referred to hereinabove.

The Court in its charge refers to the "net worth-expenditures method of establishing net income" without defining such method for the benefit of the jury. Nowhere in the Court's instructions do we find any explanation of these terms, despite the fact that the instructions repeatedly refer to the net worth-expenditures method. Thus the jury were charged that "Where a taxpayer's records are inadequate or inaccurate in substantial respects, the Courts have recognized that it is proper to determine taxable income by the net worth and expenditures method" (Tr. 2090). Again, "The Government has also sought to show by the net worth and expenditures method that the defendant fraudulently understated his net income and that of his wife for the year 1945 * * * It is sufficient to establish that part of the Government's case, if you find it has proved fraud by either method" (Tr. 2090-2091). In a case of such complexity it is unthinkable that all of the Government's evidence on the net worth-expenditures method should be submitted to the jury without any instructions as to how such evidence should be analyzed and applied. "In a crim-

inal case, it is always a duty of the Court to instruct on all essential elements of law, whether requested or not." *Morris v. United States* (1946), 9 Cir., 156 F.2d 525, 527. For an example of a recent case in which the jury were given instructions on various aspects of the net worth-expenditures method of proof, see *Pollack v. United States* (1953), 5 Cir., 202 F.2d 281, 285.

It is our contention that the brief instruction which the Court did give, as mentioned hereinabove, was more harmful to the appellant than would have been a total absence of any instruction on this subject, since the jury were told merely that the "computations" of net worth at the beginning and end of the questioned periods must be "reasonably" accurate. The jury should have been charged in accordance with other instructions proposed by the appellant, that such computations must be sufficient to establish a net worth increase beyond a reasonable doubt, and that such increase must reflect taxable income during the year in question.

It is a cardinal rule in cases of this kind that the Government's proof must exclude all income during the year in question which is derived from non-taxable sources. As this Court recently said in *Remmer v. United States,* decided May 28, 1953 (not yet reported), "where a person's net worth at the end of a particular year is greater than his net worth at the beginning of that year, and such increment is not attributable to gifts, devises, loans, or other non-income sources, an inference may be drawn that the

increase in net worth represents income to the taxpayer." Here the trial Court failed and refused to instruct the jury as to the necessity of eliminating all increment from non-income sources.

Furthermore, the Government's proof must exclude the hypothesis that the next worth increase can be explained in terms of prior accumulated assets. An increase in net worth may be treated as net income only if there is evidence of a starting point, at which time the taxpayer's assets can definitely be established, and evidence that the taxpayer had a source of income which would account for the increase in net worth. *Gleckman v. United States* (1935), 8 Cir., 80 F.2d 394; see also, Rothwacks, Criminal Tax Prosecutions, *Proceedings of New York University Eighth Annual Institute of Federal Taxation* (1950), at pp. 260-261. The starting point has been referred to as the cornerstone of a net worth case, and if that cornerstone is faulty the whole case for the Government falls. *United States v. Fenwick,* supra, at p. 492; see also, *United States v. Chapman* (1948), 7 Cir., 168 F.2d 997, 1001; *Bryan v. United States* (1949), 5 Cir., 175 F.2d 223; *Brodella v. United States* (1950), 6 Cir., 184 F.2d 823, 824. The present case involved a starting point at December 31, 1941, and an opening net worth at December 31, 1944, yet the Court gave the jury no instruction whatever as to the requirement of proving the starting point.

The instructions proposed by the appellant were intended, among other things, to define the starting point, to explain the necessity of adjusting the start-

ing point net worth in order to show the net worth at the beginning of the tax year in question, and to integrate the special criteria of a net worth case with the general instructions on circumstantial evidence and the burden of proof. In the absence of such instructions the appellant was exposed to the danger that the jury would accept the "explanations" of the Government's witnesses as announcing the law applicable to this phase of the case. The resulting prejudice to the appellant is readily apparent from the testimony which the Government was allowed to adduce from the witness Brady, who testified as to the Government's "computations" on the net worth-expenditures theory. The testimony of this witness will be dealt with hereinafter in considering the erroneous admission of evidence.

The prejudice to the appellant resulting from the lack of proper explanatory instructions on this vital issue was aggravated, we contend, by the two charges which are discussed next in order.

3. The Court erred to the prejudice of the appellant in instructing the jury regarding evidence of the possession of money and the expenditure of money (Specification No. 17).

The Court instructed the jury as follows (Tr. 2082):

> "The possession of money alone is not sufficient to establish net taxable income. That evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income."

This instruction, we urge, was highly prejudicial to the appellant because it failed to specify the "chain of circumstances" which would have to be shown before the evidence of the possession and expenditure of of money could properly be considered by the jury. Obviously such evidence, standing alone, would have no probative value whatever. Yet the jury was given no hint as to what other circumstances would have to be proved before the mere possession and expenditure of money could have any bearing on the question "whether or not the defendant enjoyed taxable income."

If the Court, in spelling out the elements constituting an offense under Section 145(b) of the Internal Revenue Code, had omitted one or more of the statutory ingredients of the crime—such as wilfulness—there can be no doubt that a reversal would be required. That situation, we submit, is not far removed from the one which actually confronts us. Here the Court purported to instruct the jury concerning the factual links which, as part of a chain of circumstantial evidence, would tend to establish that the appellant enjoyed taxable income which he did not report during the year 1945; but only two of the links in that chain are specified. The others are missing. Still the jury are led to believe, by necessary implication, that such other links are to be found somewhere in the evidence. Did not the Court instruct them that they could consider this chain of circumstances? By failing to instruct fully on this matter, the Court virtually withdrew from the jury the right to pass upon the other

circumstances necessary to establish the existence of unreported income. Having undertaken to instruct the jury in the first place, the Court, we say, was under a duty to complete the task in order that the triers of the facts might know what facts to try.

The mystery which surrounds this "chain of circumstances" finds no solution elsewhere in the Court's instructions. We search in vain for any instructions on the net worth-expenditures method of proof, which, if given, might have furnished some clues to the missing circumstances.

Certainly the Court placed undue and prejudicial emphasis upon the particular circumstances mentioned in the charge. And this contributed to a lack of balance in the instructions as a whole, which will be discussed hereinafter.

4. The Court erred to the prejudice of the appellant in instructing the jury as to the relevancy of evidence pertaining to the practice of gambling and the income therefrom during the year 1945 (Specification No. 18).

The Court charged the jury as follows (Tr. 2087):

> "Evidence has been admitted in the trial of this case as to the practice of gambling during the year 1945 on the premises controlled by defendant, and evidence has been admitted that the defendant received income from the practice of gambling during 1945 on which he paid no tax.
>
> "Such evidence, if believed, may be considered by you only for the limited purpose of showing that defendant had a source of income from an illegal business which he concealed from the tax authorities. It may be considered by you to show

that the defendant had a plan or scheme of operation in prior years resulting in income to the defendant continuing over to and similar to that used in 1945, and to show the intent of the defendant to defraud the Government of income taxes during the year 1945."

The first paragraph of the instruction seems clear enough. The jury are told that there is evidence as to the practice of gambling during the year 1945 on premises controlled by the appellant, and as to the appellant's receipt of income from such gambling on which he paid no tax. The instruction then states that "such evidence" may be considered "only for the limited purpose" of showing that the appellant "had a source of income from an illegal business which he concealed from the tax authorities".

Assuming that there was such evidence in the record, it would not tend to show that the appellant concealed the source of such income. On the contrary, the appellant's returns for 1945, as well as other years, disclosed that a portion of his reported income was derived from gambling. (See Exh. 1-8 incl.) In addition, the partnership returns of the Wai Yuen Club for the years 1938 and 1939, on which the appellant was listed as a partner, reveal that the occupation of the club was "house of games". (See Exh. 48, 49).

The instruction next states that such evidence—that is, evidence of the practice of gambling in 1945 and income therefrom on which the appellant paid no tax —may be considered by the jury for purposes of showing that the appellant had "a plan or scheme of opera-

tion in prior years'' resulting in income to him ''continuing over to and similar to'' the plan or scheme of operation used in 1945. It is difficult to conceive how evidence pertaining to the year 1945 could, without more, show a plan or scheme of operation in prior years. Moreover, even if we take the Court's word for that—as the jury was bound to do—we face the further question as to how or in what manner evidence of a plan or scheme of operation in prior years can affect the issue in this case, which is confined to the year 1945. The answer is, of course, that such evidence relating to prior years would be relevant only insofar as it might show the appellant's intent in 1945, which completes the process of reasoning in a circle and brings us back to the year 1945, our point of departure.

The Court then concludes the instruction by stating that such evidence—meaning, again, evidence of gambling in 1945 and income therefrom on which the appellant paid no tax—may be considered to show ''the intent of the defendant to defraud the Government of income taxes during the year 1945''.

If the foregoing analysis appears to be involved and obfuscated, it is so only because the Court's charge deserves the same characterization. Such an instruction could serve only to confuse the jury and to implant in their minds the impression that the appellant, in 1945 and prior years, was engaged in a clandestine and sinister enterprise which he tried to conceal from the Government in order that he might thereby evade his income tax.

If the Court intended this to be a so-called "source of income" instruction as an adjunct to the net worth-expenditures theory, such purpose should have been made clear to the jury. As has been indicated, an increase in net worth may be considered as net income only if there is evidence of a starting point, at which time the taxpayer's assets can definitely be shown, coupled with evidence that the taxpayer had a source of income which would account for the increase in net worth. Here, as we have seen, the Court gave no instruction whatever as to the necessity of proving a starting point, and in other respects the jury were not fully instructed regarding the elements of a net worth-expenditures case. Thus the jury were induced to consider the "source of income" instruction, not as a facet of the net worth-expenditures method, but as an independent matter. So considered, the instruction places an unnatural emphasis upon the nature of the business referred to therein, and encourages the jury to believe that the appellant *must have* evaded his income tax in 1945 *because* he was interested in certain gambling enterprises. This is borne out by the fact that the Court had previously given a similar charge (Tr. 2086) in which reference was made to a "source of unreported income" and a "scheme of conduct."

5. **The Court erred to the prejudice of the appellant in instructing the jury as to the standard for determining criminal intent** (Specifications Nos. 19 and 20).

The Court charged the jury as follows (Tr. 2089):

> "The word 'wilful' when used in a criminal statute generally means an act done with a bad

purpose; without justifiable excuse; or stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether one has the right so to act."

If the Court had stopped at the first semi-colon in this instruction, or perhaps at the end of the first sentence, we assume that the charge would have been proper. But when the Court went on, in the second sentence, to set up another and different definition of the word "wilful"—a definition which clearly does not fit the statute—it fell into serious error.

That the Court actually gave the jury at least two different meanings of "wilful" seems obvious from the language itself. And this conclusion is confirmed by a reference to the case of *United States v. Murdock* (1933), 290 U. S. 389, 54 S.Ct. 223, 78 L.Ed. 381, from which the language of the charge is derived. In that case the Supreme Court affirmed the reversal of a conviction under Section 1114(a) of the Revenue Act of 1926 and Section 146(a) of the Revenue Act of 1928 (forerunners of Section 145(a) of the Internal Revenue Code) because of the trial Court's refusal to instruct the jury that it should consider whether the defendant acted in good faith. In rejecting the contention that the word "wilful," as used in the statutes, "means no more than voluntarily", the Court said (290 U. S. 394):

"The word often denotes an action which is intentional, or knowing, or voluntary, as distin-

guished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose (*Felton v. United States,* 96 U. S. 699, 24 L.Ed. 875; *Potter v. United States,* 155 U. S. 438, 39 L.Ed. 214, 15 S.Ct. 144; *Spurr v. United States,* 174 U. S. 728, 43 L.Ed. 1150, 19 S.Ct. 812); without justifiable excuse (*Felton v. United States,* supra; *Williams v. People,* 26 Colo. 272, 57 Pac. 701; *People v. Jewell,* 138 Mich. 620, 101 N. W. 835; *St. Louis I. M. & S. R. Co. v. Batesville & W. Teleph. Co.,* 80 Ark. 499, 97 S. W. 660; *Clay v. State,* 52 Tex. Crim. Rep. 555, 107 S. W. 1129); stubbornly, obstinately, perversely, *Wales v. Miner,* 89 Ind. 118, 127; *Lynch v. Com.* 131 Va. 762, 109 S. E. 427; *Claus v. Chicago G. W. R. Co.* 136 Iowa, 7, 111 N. W. 15; *State v. Harwell,* 129 N. C. 550, 40 S. E. 48. The word is also employed to characterize a thing done without ground for believing it is lawful (*Roby v. Newton,* 121 Ga. 679, 49 S. E. 694, 68 L.R.A. 601), or conduct marked by careless disregard whether or not one has the right so to act, *United States v. Philadelphia & R. R. Co.* (D. C.) 223 Fed. 207, 210; *State v. Savre,* 129 Iowa, 122, 105 N. W. 387, 3 L.R.A. (N. S.) 455, 113 Am. St. Rep. 452; *State v. Morgan,* 136 N. C. 628, 48 S. E. 670."

The Court went on to adopt the "bad purpose" meaning as the test of wilfulness under the statutes then before it. In its opinion the Court made reference to its previous decision in *Felton v. United States* (1878), 96 U. S. 699, 24 L.Ed. 875, construing another revenue law, in which it was held that "an evil motive is a constituent element of the crime" (290 U. S. 395). The Court concluded by saying that while the

conduct of the accused "was intentional and without legal justification", the jury might nevertheless find that it "was not prompted by bad faith or evil intent, which the statute makes an element of the offense" (290 U. S. 397-398).

Later decisions of the Supreme Court have construed Section 145 (b) of the Internal Revenue Code as requiring proof of a specific purpose to evade tax. *United States v. Ragen* (1941), 314 U. S. 513, 62 S.Ct. 374, 86 L.Ed. 383; *Spies v. United States* (1943), 317 U. S. 492, 63 S.Ct. 364, 87 L.Ed. 418. See also, *United States v. Martell* (1952), 3 Cir., 199 Fed. 670; *Screws v. United States* (1945), 325 U. S. 91, 101, 65 S.Ct. 1031, 89 L.Ed. 1495, 1502; *Dennis v. United States* (1950), 341 U. S. 494, 499, 500, 71 S.Ct. 857, 95 L.Ed. 1137, 1147-1148. In the *Spies* case, supra, the Court, after reviewing the entire structure of sanctions, both civil and criminal, provided for the enforcement of the revenue laws, observes that "The climax of this variety of sanctions is the serious and inclusive felony defined to consist of wilful attempt in any manner to evade or defeat the tax" (317 U. S. 497). The Court refers to this felony as "the capstone" of this system of sanctions (317 U. S. 497), embracing "the gravest of offenses against the revenues" (317 U. S. 499), and requiring proof of a "tax-evasion motive" (317 U. S. 499).

In the language of the *Spies* case, "wilful, as we have said, is a word of many meanings" (317 U. S. 497). In the present case the Court should have confined its charge to the meaning of the term as used in

the statute here involved. Instead, the Court instructed the jury that "The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether one has the right so to act." This is not the standard of guilt prescribed by Section 145(b). It is not enough under that section for the prosecution to show that the accused acted without ground for believing that his conduct was lawful, or that he was careless as to whether he had a right to act as he did. The statute was not intended to impose punishment upon taxpayers who are merely careless or negligent. It requires proof of a bad purpose, an evil motive, a specific intent to evade the tax.

It is to be noted, also, that this error was magnified by repetition, since the jury were told elsewhere in the instructions that "no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he files" (Tr. 2083). Apart from the fact that the wording of this charge seems to place a burden of exculpation upon the accused—as if to say that he must prove his good faith and ordinary diligence—the Court's further reference to the test of due care was misleading and prejudicial.

While it is true that the Court in other portions of its charge told the jury that the prosecution must prove an intent to evade the tax, such instructions, we submit, were "watered down" by the erroneous instructions mentioned hereinabove. Instructions per-

taining to the subject of criminal intent are of the essence in a criminal case. They should be crystal-clear and they should not deviate from the statutory standard.

In *United States v. Martell,* supra, the Court charged the jury that "there is no wilfulness needed in an income tax case" (199 F.2d 671), but immediately thereafter stated that the burden of proof was on the Government to show that the defendant filed the return with a bad purpose. Upon the defendant's objection to the first part of the charge, the Court proceeded to give the following "curative" instruction (pp. 671-672):

> "In other words, members of the jury, I will read the precise language that the Supreme Court uses. The Supreme Court says: 'The Government must prove beyond a reasonable doubt the defendant with a bad purpose attempted to evade his tax. The jury can take all of the evidence into account to determine the defendant's intent or purpose.' * * * "

Despite this effort of the trial Court to correct the erroneous portion of the charge, the Appellate Court held that "the sum total of these instructions was to confuse the jury about what was required" (p. 672), and that "the probability of confusion was such as to create reversible error" (p. 672). The Court said (p. 672):

> "The rule concerning the state of mind required for conviction for this offense is discussed in *United States v. Murdock,* 1933, 290 U. S. 389, 394, 396, 54 S.Ct. 223, 78 L.Ed. 381, and *Hargrove*

v. United States, 5 Cir., 1933, 67 F.2d 820, 823, 90 A.L.R. 1276. Willfulness is an essential element of the crime proscribed by §145(b). It is best defined as a state of mind of the taxpayer wherein he is fully aware of the existence of a tax obligation to the Government which he seeks to conceal. A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable. A conviction cannot be sustained unless this state of mind is supported by the evidence and explained to the jury."

In the present case the Court's instructions on this crucial subject of wilfulness were obviously conflicting, yet the Court made no attempt to correct the erroneous charge. Here the "probability of confusion" was no less evident than in the *Martell* case.

As was said in *Screws v. United States,* supra, "An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime * * * And that issue must be submitted to the jury under appropriate instructions * * * " (325 U. S. 101). In that case the Court reversed a conviction because of the failure of the trial Court to give a proper instruction on the meaning of the word "willfully" as used in the particular statute upon which the indictment was founded, saying (325 U. S. 107):

"And where the error is so fundamental as not to submit to the jury the essential ingredients of the

> only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

In the present case the errors were detected by the appellant and called to the attention of the trial Court. Surely he was entitled to be tried by the measure of guilt which Congress has laid down.

6. The instructions, taken as a whole, were unbalanced and did not fairly present the issues.

As we have seen, the trial Court refused to instruct the jury as to the settled legal criteria applicable to cases involving the net worth-expenditures method of proof. On the other hand, the Court did give certain instructions requested by the Government which, though apparently related to the net worth-expenditures theory, were in no way identified with it. These were the instructions, discussed hereinabove, pertaining to the possession and expenditure of money, and to the practice of gambling and the income therefrom during the year 1945. Such instructions, however, were not only erroneous in themselves, but they disabled the jury from viewing the whole case in proper focus.

The prejudice to the defendant was intensified by other so-called "fact" instructions which tended to over-emphasize the particular circumstances posited in the charge—for example, the instruction regarding

the bonus checks issued to employees of the Wai Yuen Club (Tr. 2088-2089), and the instruction concerning partnership returns (Tr. 2089).

Against this background, the Court's instruction regarding the "failure of the defendant to offer explanation" of the Government's evidence looms large as a factor of prejudice.

It is our position that the rulings of the Court relating to the instructions, given and refused, were individually prejudicial, and that on the whole the instructions given were unbalanced and did not fairly orient the jury in this complicated case.

II. ERRORS IN ADMISSION OF EVIDENCE.

1. **The Court erred to the prejudice of the appellant in admitting in evidence testimony of the witness William A. Wallace in respect to information and instructions received from appellant in connection with the preparation of tax returns of which said witness had no testimonial knowledge** (Specifications Nos. 1, 2, 3, 4, 5).

(a) During the years 1941-1946, Wallace, who admitted he acted as appellant's tax consultant, prepared and filed with the Bureau of Internal Revenue numerous Federal tax returns. Included among these were twenty partnership returns of income (Exh. 13, 12, 68, 67, 66, 66A, 63, 15, 14, 17, 16, 70, 69, 19, 18, 62, 61, 20, 21 and 30—in the order of their appearance during his testimony; Tr. 1063-1105). Eight of the above twenty returns (Exh. 15, 17, 19, 20, 21, 30, 13, and BU) were for the year covered by the indictment, namely 1945. With the exception of the partnership returns of the Admay Co., which covered several hotel and apartment house operations conducted by that

partnership on real property leased to it by the Gerdon Land Co., so-called "Gerdon property", the above partnership returns generally reported the income and expenses pertaining to a single parcel of real property, admittedly owned by appellant (so-called "Chin property"). In 1945 six of the partnership returns covered "Chin" property and two covered operations on "Gerdon" property (Tr. 1182).

Wallace knew some of this real property was owned by appellant and some by Gerdon Land Co., and was aware of the fact that his office was reporting in partnership returns the income and expenses derived from them (Tr. 1180-83). But Wallace himself had nothing to do personally with the partnership accounts or appellant's personal matters of property (Tr. 1153-4). For some of these properties his office had been preparing partnership returns year after year (see Exh. 14, 16, 18, 61, 62, 66, 66A, 67-70, 318-324.) Information as to the amount of gross receipts or rentals derived from the properties was received by Wallace's office from real estate agents and persons other than appellant (Tr. 1173-6), as to the expense item of real property taxes from appellant's attorney, one Allen, who paid them (Tr. 1233) while the depreciation was calculated by Wallace's office. For the various hotels operated by the Admay Co., Wallace's office set up and maintained separate books (Exh. CL, CM, CN, CO and CP) in a manner and form according to Wallace's judgment (Tr. 1171).

In the light of the foregoing practices extending over several years, the conclusion is inescapable that

Wallace as a tax consultant and a practitioner enrolled before the United States Treasury Department (Tr. 1242) approved the reporting of this income on a partnership basis. He believed that Peffers, his assistant, considered these real estate operations as partnerships for tax and accounting purposes (Tr. 1244) and the record is bare of any indication of disagreement with the returns on Wallace's part. In fact when, in 1946, all of these partnerships were telescoped into one partnership (Exh. 63), he clearly appears in the role of a tax adviser, admitting at the same time that the idea of the new partnership for 1946 did not originate with appellant (Tr. 1260-65).

During the course of the Government's examination of this witness, he was asked from whom he received instructions as to the division of the income of these partnership returns or, as it was sometimes put, as to where he secured the information in respect to partners shares. In each instance, the witness named appellant as the person giving him such information or instructions (Tr. 1063-1105 passim). In connection with the 1945 partnership return of Admay (Exh. 13), Wallace, on redirect examination stated that "it is usually the procedure to have Mr. Chin indicate who the partners are" (Tr. 1411). On cross-examination Wallace admitted he had no personal knowledge of the communication of such information either to himself or others in his presence (Tr. 1294).

The Court's refusal to strike this evidence was erroneous. It is crystal clear that the witness had no "testimonial knowledge".

> "Courts have often uttered in broad terms the general principle of the necessity of Observation as a foundation for testimony * * * The first corollary from the general principle of Knowledge is that what the witness represents as his knowledge must be an impression derived from the *exercise of his own senses,* not from the reports of others, —in other words, must be founded on personal observation". (Wigmore on Evidence, 3rd Ed., vol. 2, sections 656, 657.)

In the words of the same authority (Wigmore on Evidence, 3rd Ed., Vol. 2, section 655, p. 759), "where the subsequent course of the examination develops a total lack of opportunity of knowledge, no doubt the testimony may be struck out".

This testimony was most prejudicial to appellant. The partnership issue came down to the question whether appellant with criminal intent to evade his taxes was arbitrarily directing the reporting of this real property income on a partnership basis and the improper "division" of it among partners, or whether this method of income reporting was adopted in good faith and after consultation with the tax adviser. Apparently, Wallace and his assistant Peffers felt that the partnerships were acceptable as they were (Tr. 459). Their continuance of this practice over a number of years is a circumstance in appellant's favor. In any attempt by the Government to fasten upon appellant a criminal intent as the inspiring genius in this method of reporting income, appellant was entitled to have appellant's communications to Wallace's office fully brought out by the person having testimonial

knowledge of them. Instead, the bare statement in the record by Wallace that appellant directed a division of income through partnerships conveys an impression at once misleading and inconsistent with the undisputed background facts of the activities of Wallace's office. Its acceptance on this aspect of the case where the issue was sharply drawn because of the troublesome and confused nature of family partnerships (cf. Tr. 459) was in violation of the rule "rejecting assertions offered testimonially, which have not been in some way subjected to the test of cross-examination" (Wigmore on Evidence, 3rd Ed., vol. 5, section 1362).

(b) Wallace or his office also prepared and filed with the Bureau of Internal Revenue the tax returns of some of appellant's children. Over the years, he became generally familiar with appellant's family and knew some of the children, at the same time as he prepared returns for appellant and for the above partnership operations (Tr. 1155-57). In doing this, his office followed the practice of transposing to the individual returns of appellant and children, their respective shares of the partnership income appearing in the partnership returns he, Wallace, had prepared in his office (Tr. 1156, 1230).

On direct examination by the Government in respect to four 1945 individual income tax returns of appellant's children (Exh. 23, Alvin Chan; Exh. 25, Janet Chan Lee; Exh. 29, Norman Chan; and Exh. 22, Bertha Chan), Wallace testified that appellant gave him the information and instructions as to the income to be reported on said children's returns (excepting iso-

lated items of farm and salary income) (Tr. 1109-17). On cross-examination, Wallace admitted he had no personal knowledge of the communication of any such information or instructions, either to himself or others in his presence (Tr. 1290-93).

The refusal of the Court to strike this evidence was erroneous on the same principles heretofore discussed. (See subdivision (a), supra.) This error was prejudicial to appellant, since it augmented the error discussed in subdivision (a) hereof, conveying the impression that appellant first directed the division of the partnership income, and then, to consummate the scheme directed its distribution upon his children's returns.

(c) This accumulated error was itself augmented during the redirect examination of Wallace, when he testified that a deduction for depreciation taken on appellant's sons return (Exh. 23, Alvin Chan) "was evidently directed to Mr. Peffers when he prepared the return", meaning, as it is apparent from the context, directed by appellant (Tr. 1412-1413). It is clear from the testimony at this point that Wallace had no "direct knowledge" and that his foregoing testimony was hearsay.

(d) The substantial impact of all the foregoing on the jury is appreciated when reference is made to the Government's list of appellant's income omissions in Exhibit 334. Wallace's testimony was at the basis of the first seven items in this summary, representing the most substantial part of the alleged omissions, an amount of $70,495.99 out of the claimed total of $108,-631.11.

2. The Court erred to the prejudice of the appellant in admitting in evidence the conclusions and opinions of the witnesses William A. Wallace and James L. Wiley, as to the character and ownership of Gerdon Land Co. Accounts Payable and in admitting in evidence, during the Government's examination of the witness Liston O. Allen, Exhibits Nos. 92, 93, 94, 95, 247 and 248 (Specifications Nos. 6, 7, 8).

(a) There appeared on the books of the corporation Gerdon Land Co., which Wallace set up and maintained, a ledger account entitled Accounts Payable No. 20 (see Exh. 56a, Accounts Payable No. 20.) These books were not appellant's (Tr. 1296). The above Accounts Payable provided for entries of debits (money going out of the corporation), credits (money coming into the corporation) and a balance. The balance represented a liability of the corporation (Tr. 1295-97). The question was—to whom?

This question became an important one on the issue of appellant's intent in connection with the partnerships, because the net cash available for disbursement after payment of expenses, derived from the largest partnership—the Admay Co.—in effect wound up in Gerdon Land Co., appearing as a credit in Account No. 20, whereas the rent charged by Gerdon Land Co. (which owned the property) to Admay Co. (which leased it) appeared as an offsetting debit usually entered at the end of the year.

The theory of the Government, in its attack on the partnerships, was that: first, the balance of the above ledger account represented a liability to one person, viz. appellant; secondly, appellant ultimately got the partnership moneys.

The Government attempted to prove the first through two witnesses, Revenue Agent Wiley and Wallace.

On direct examination Wiley was asked (Tr. 379-381):

"Q. Does this have any name at the top of the account other than 'Accounts payable, Account 20'?

A. No, sir.

Q. You say this you identify with the defendant Chin Lim Mow. Through what means do you do that?

Mr. Sullivan. I object to that, if your Honor please, on the ground it calls for secondary evidence; that the best evidence are the books themselves.

The Court. Objection will be overruled.

A. Through Mr. Peffers, the accountant.

Mr. Sullivan. I move to strike—pardon me, your Honor please—I move to strike the answer as based on hearsay.

The Court. Motion denied.

Q. (By Mr. Fleming). Was Mr. Peffers the man who kept the books?

A. Yes, sir.

Q. Did you also examine some of the specific transactions in this Account 20 to identify them?

A. Yes, sir.

Q. And what was the result of that examination?

A. Well, there have been—I don't quite understand what you mean, Mr. Fleming.

Q. Well, let me ask it this way: did you make a detailed examination of the entries contained therein?

A. Yes, sir, I made a transcription of all the detailed entries in this account.

Q. As a result of that work did you identify that account with the defendant, Chin Lim Mow?

Mr. Sullivan. I object to that, if your Honor please, on the ground it calls for an opinion and conclusion of the witness.

The Court: Overruled,—

Mr. Sullivan. I am sorry, your Honor. I submit the books are the best evidence as to whether they identify themselves with the defendant, Chin Lim Mow.

The Court. Overruled.

Mr. Fleming. Will you read the question?

(Question read.)

A. Yes, sir."

On redirect examination Wiley was asked (Tr. 478-479):

"Q. Mr. Wiley, to whom did you attribute that account in your own report?

Mr. Sullivan. I object to the question, if your Honor please, being an opinion and conclusion of the witness; and upon the ground the books are the best evidence; upon the further ground that the report is hearsay, not binding on this defendant.

The Court. Objection will be overruled.

A. Would you restate it? May I have the question read, please?

The Court. Read the question, Mr. Reporter.

(Question read.)

A. Mr. Chan.

Q. (By Mr. Fleming). By Mr. Chan, you are referring to the defendant, Chin Lim Mow?

A. Yes, sir."

On direct examination Wallace was asked (Tr. 1124-1125):

"Q. And that is headed accounts payable, account No. 20?

A. That is right.

Q. Do you find a credit or a debit amount in that account?

A. Credit.

Q. Does that mean, then, that this reflects monies owed by the corporation or owed to the corporation?

A. Owed by the corporation.

Q. What amount do you find in there at the end of 1944?

A. $235,606.75.

Q. The end of 1945, directing your attention to the first figure—

A. $306,568.83.

Q. To your knowledge to whom are those monies owed by the corporation?

Mr. Sullivan. I object to that, if your Honor please, on the ground the books are the best evidence. It calls for the conclusion and opinion of the witness.

The Court. If he knows he may answer.

The Witness. We have referred to this account in the past as Chin's account in our office conversations.

Mr. Sullivan. I move to strike that, if your Honor please, upon the following grounds: one, it is the conclusion and opinion of the witness; second, it is hearsay. There is no statement in the

witness' testimony that the defendant was present when that reference was made; on the third ground—well, I will rest on those.

The Court. The motion is denied.

Q. (By Mr. Fleming). Does it represent, according to your knowledge, a liability to one person or more than one person?

Mr. Sullivan. The same objection, if your Honor please, on the ground the books are the best evidence. It calls for the conclusion and opinion of the witness.

The Court. The objection will be overruled.

The Witness. To one person.

Q. (By Mr. Fleming). Who is that one person according to your knowledge?

Mr. Sullivan. The same objection, if your Honor please.

The Court. Same ruling.

A. Mr. Chin."

On redirect examination Wallace was asked (Tr. 1366-1367):

"Q. Could you then answer the question again, and tell me whether Account 20 represents, according to your knowledge, a liability to one person or to more than one person?

Mr. Sullivan. I object to that, if your Honor please, on the ground the books are the best evidence. It calls for the conclusion and opinion of the witness.

The Court. The objection will be overruled.

A. To answer that—will you ask that question again?

(Question read.)

A. I think my answer is as read from that prior transcript; that answers it correctly. We were dealing with one person, and, so far as I knew, that was the man we were dealing with and apparently—

Mr. Sullivan. I move to strike that answer, if your Honor please.

The Court. The motion is denied.

Q. (By Mr. Fleming). And the Account 20, according to your knowledge, represents a liability to which person?

Mr. Sullivan. Same objection.

The Court. Same ruling. Overruled.

A. Chin Lim Mow."

Assuming their relevancy, the books themselves were the best evidence. They were not appellant's books or in his handwriting. They were not even in the handwriting of Wallace (much less Wiley) who admitted there was not a "scratch" of his "pen" in any of the Gerdon books (Tr. 1447).

The books themselves were the best evidence, and were in Court. Wiley's statements as to with whom he "identified" Account 20 was his naked opinion. Wiley's report to his superiors including any statements pertaining to Account 20 would, if offered by the Government, be rank hearsay; certainly therefore his testimony as to the contents of the report were equally, if not more, objectionable.

Wallace's testimony on this subject also represented naked opinions. He admitted as much on cross-examination (Tr. 1447-51).

In reality, both Wiley and Wallace were expressing their understanding or how they "considered" the account (to use Wallace's words). Such testimony was not admissible. (32 *C.J.S., Evidence,* sec. 451.)

(b) During the direct examination of the witness Liston O. Allen, who, with his brother John J. Allen, Jr., acted as attorney for Gerdon Land Co., as well as for appellant (Tr. 640-1), the Government offered and the Court received in evidence six checks of the Gerdon Land Co., signed by John J. Allen and Donald Allen (another brother and corporate officer) payable to the order of appellant and in amounts and dates as follows: Exhibit No. 92, $75,000 dated July 16, 1946 (Tr. 683); Exhibit No. 93, $46,000, December 6, 1946 (Tr. 686); Exhibit No. 94, $25,000, August 22, 1946 (Tr. 690); Exhibit No. 95, $8,243.50, August 22, 1946 (Tr. 684); Exhibit No. 247, $75,046.76, January 14, 1947 (Tr. 687); and Exhibit No. 248, $44,459.09, April 1, 1947 (Tr. 688).

All of these were admitted in evidence over appellant's objection that they were irrelevant and immaterial, not within or connected up with the issues of the case (cf. Tr. 683). The objection was renewed in more specific terms upon the offer of Exhibits 247 and 248 (Tr. 687-8). In response to the objection entered to Exhibit 247, the Court said (Tr. 687): "* * * I am admitting it in evidence because it tends to show a common pattern". The Court did not indicate, however, nor did the Government offer to state, what the common pattern was.

In connection with the offer of each check, the prosecutor directed the attention of the jury to the entry of said check in the ledger of Gerdon Land Co., as a charge against Account No. 20.

The relevancy of this documentary material never appeared. None of the checks were ever logically connected up with either of the Government's two "methods" or "theories" of case: they did not represent a specific income omission (see Exh. 334); they were not taken in account in any net worth analysis (see Exh. 339). They are patently remote in time and not occuring in the year of the indictment. If the intimated, albeit unexpressed purpose, of their offer (as gleaned from references to Account 20) is to show that appellant "got the money", such a purpose is defeated by the evidence itself on two grounds: (a) nowhere does the Government show that these checks represent proceeds from the partnerships; (b) the account itself (see Exh. 56, Acc. No. 20) shows a credit balance *at the time each check was drawn* sufficiently large to cover the Admay partnership proceeds credited to Account No. 20 (estimated at $100,000) to show that appellant was receiving from Gerdon *his own money for which he was charged on the corporate books* (see testimony Wallace, Tr. pp. 1438-40); (c) *in fact,* appellant did not funnel any partnership money out of this account by these checks because the credit balance in Account 20 actually *increased* approximately $30,000 in 1945, and although it decreased about the same amount (approximately $34,-

000) in 1946, it increased substantially in subsequent years, and at December 31 of every year from 1947 to 1951, the balance was considerably in excess of that used by the Government in its balance sheet (Exh. 339).

(c) The admission of the above oral and documentary evidence was prejudicial because it created the impression that appellant was by indirect means appropriating to himself the proceeds of the Admay partnership. The impact of this on the jury cannot be lost sight of, since the above six checks in themselves of no relevancy, were first associated seriatim with Account 20 and then treated in total, although representing withdrawals over a period of seven months, thus conveying the idea to the jury that appellant was funneling out huge sums of money (Exh. 92, 93, 94, 95, 247 and 248, total $273,749.35). The prosecutor had the witness Allen total on a blackboard (Tr. 689) Exhibits 92, 93, 95, 247 and 248 *along with* a check for $96,830.71 in Exhibit No. 71, to give a total of $345,-880.06. This last exhibit did not affect the balance of Account 20 at all as the Government's main witness, Wallace, admitted on recross examination (Tr. 1434-1437); its addition to the other checks only augmented the prejudicial effect of this evidence.

3. **The Court erred to the prejudice of the appellant in admitting in evidence extracts of a statement made by Government witness William A. Wallace to the Intelligence Unit** (Specification No. 9).

During the course of his direct examination Wallace was interrogated from time to time about a 1946

Partnership Return of Income prepared and filed for appellant and two of appellant's children (Exh. 63). The apparent purpose of such an inquiry was to show that real property which appeared on certain 1945 Partnership Returns, was listed in a new partnership in 1946, that there were no records relative to the dissolution of the 1945 partnerships or relating to the distribution of their capital to the former partners at the end of 1945 (Tr. 1077-8, 1084, 1087, 1091, 1099, 1103). In effect, what happened was that all "family" partnerships were in 1946 consolidated in one. On direct examination, Wallace explained this and stated it arose out of a suggestion of Revenue Agent Wiley, and after a discussion of Wallace with appellant's attorney "and I think Mr. Chin himself" (Tr. 1081). On cross-examination (Tr. 1261) Wallace testified that the matter of the various partnerships was discussed with Wiley on two occasions, that Wiley suggested "that one family partnership be set up and the pro-rata of the income be based on the amount of services the members of the family gave to the partnership", that he, Wallace, advised appellant to follow this recommendation and that the idea of the 1946 partnership did not originate with appellant (Tr. 1261).

On redirect examination, and over repeated objections of appellant, the Court permitted the Government to interrogate Wallace in respect to extracts from a written statement given by Wallace to the Intelligence Unit on October 18, 1949 (Tr. 1414-18). We have set forth in the Appendix at page vi et seq. the

entire matters surrounding the admission of this testimony, including the objection of appellant.

In summary Wallace admitted to having made statements to the Intelligence Unit in 1949 which were contradictory to his testimony in Court and in which he stated in connection with the Admay Co. that he had no discussion as to why a partnership return was not filed in 1946 for that company, and was not consulted about any income tax problems that may have been presented by the plan of dissolution of Admay. Nowhere in the pertinent testimony do we find any attempt on the part of the Government to justify this line of inquiry. (Please see Appendix pages vi-x.) No surprise was claimed by the prosecutor, and it is reasonable to infer from the fact that Wallace had testified at an earlier trial of the same indictment (Tr. 1424, et seq.) that none could be claimed. No hostility of the witness was charged nor could it be properly charged in the light of all the testimony of this witness. Under the circumstances, the Government's inquiry was governed by the rule against impeachment of one's own witness and did not come within any of the recognized exceptions. *Hickory v. United States* (1893), 151 U. S. 303, 309, 14 S.Ct. 334, 38 L.Ed. 170; *United States v. Graham* (1939), 2 Cir., 102 F. 2d 436, 441; *Ellis v. United States* (1943), 8 Cir., 138 F. 2d 612, 615. See generally, *Cyc. Fed. Proc.* (3d Ed.) vol. 8, sec. 26.137 et seq.

It was prejudicial to appellant to sanction this impeachment of Wallace. The foregoing testimony on direct and cross-examination brought into sharp focus

Wallace's activities as a tax consultant. It showed that Wallace was in fact advising appellant on the troublesome and confusing subject of family partnerships for tax purposes (cf. testimony Wiley, Tr. 459) and at the same time counteracted any impressions from other testimony of the same witness, that appellant devised such partnerships as schemes of tax evasion. On the other hand, such testimony, free of impeachment, could have very well conveyed the impression to the jury that the many partnership returns prepared by Wallace over the preceding years had their origin in the advice of a tax consultant rather than in any personal scheming of appellant.

4. **The Court erred to the prejudice of the appellant in admitting in evidence during the Government's examination of the witnesses Evelyn Lee Chang, L. F. Clarke, Dana E. Bremner, Leon C. Banker, and Norman Ogilvie, certain oral and documentary evidence of transactions pertaining to the Pacific National Bank trustee account of Howard and Evelyn Lee Chang and the purchase of "The Quarry"** (Specifications Nos. 10, 11 and 12).

In our statement of the case, supra, under the subtitle "The Net Worth Case—Chang Trustee Account", we have set forth the salient features of this evidence. The net result of the evidence was to add to appellant's closing net worth at December 31, 1945 (see Exhibit 339 reproduced in Appendix), and thus to appellant's reconstructed income on a net worth basis, the amount of $100,000. This $100,000 is distributed among the asset items of appellant's balance sheet in the following manner: (a) $12,500 represented by a cashier's check issued by said bank (Exh. 233) dated November 13, 1945, payable to the order

of Pacific States Savings & Loan Society, procured by Evelyn Lee Chang with funds from said bank account (Exh. 240) and charged to the account (Exh. 239, page 2; Exh. 338, item 5); (b) $17,500 represented by the balance in said account at December 31, 1945 (Exh. 239, page 3; Exh. 278, item 12); (c) $70,000 represented by currency in that amount delivered by appellant to Mrs. Chang and by her deposited in the account on January 3, 1946 (Exh. 239, page 3; Exh. 278, item 15).

It will be seen, therefore, that each of the three asset items charged to appellant is referable to the trustee account, and that in effect, the net worth analysis treats the account as if it were appellant's. *But there is no testimony at all in the record that the bank account was appellant's.* Mrs. Chang testified on direct examination (Tr. 1495) that she signed the signature card (Exh. 230) at her husband's request; and that "this account as I understand it, was opened as a trusteeship for Mr. C. C. Wong and in my husband's absence and in Mr. Wong's absence I was to take my instructions from Mr. Chan" (meaning appellant) (Tr. 1496). The witness admitted she knew C. C. Wong, who was an old friend of her husband (Tr. 1511). L. F. Clarke of the Pacific National Bank, who produced the records of this account, did not in any way identify appellant with it. Nevertheless, on direct examination of this witness, at the very start of her testimony on this subject and over appellant's objection, both the signature card (Exh. 230) and the ledger cards (Exh. 239) of the account were admitted in evidence (Tr. 1494, 1496).

We, therefore, next take up separately the three items of the account above referred to, to the end of demonstrating the monies represented by them were not shown to be appellant's:

(a) ($12,500) The cashier's check representing this sum was obtained at appellant's direction but *in reality* upon directions given Mrs. Chang by her husband, Howard Chang, to take instructions from appellant in his and Wong's absence (Tr. 1496-7). Her husband had previously left for China (Tr. 1495). An attempt was made by the Government to charge this $12,500 to appellant through the testimony of Mr. Clarke, that the original deposit of $30,000 in the account was in a miscellany of currency (Tr. 1458) and that although he could not state who brought in the $30,000 and who brought in the subsequent deposit of $70,000, one of the deposits was brought in by Mrs. Chang and the other by "a Chinese gentleman". Mrs. Chang stated she did not know if she made the $30,000 deposit (Tr. 1495), but admitted on cross-examination that she made the $70,000 deposit (Tr. 1510). It is a reasonable inference from the testimony that Howard Chang was in the United States on October 9, 1945, the date of the signature card which he signed and the date of the $30,000 initial deposit. On the other hand, no reasonable inference can be drawn from the fact that the check which appellant instructed Mrs. Chang to draw on November 13, 1945, came from the original currency deposit, because on November 1, 1945, that $30,000 had been exhausted and *an overdraft of $2500* existed in the account (Exh. 239, page

2). *The only source of funds available for the check of $12,500 on November 13, 1945, was the deposit of $23,820 on November 3, 1945. The Government made no attempt even to trace the last mentioned deposit to appellant.*

(b) ($17,500) This year-end balance can only be traced to two deposits in the account—the November 3, 1945 deposit of $23,832 above mentioned, and the November 19, 1945 deposit of $8,668. *The Government introduced no evidence whatsoever concerning these deposits or their source.*

(c) ($70,000) Mrs. Chang testified on direct examination that the appellant gave her this amount in currency, which was deposited in the bank account of January 3, 1946, appellant's chauffeur having driven her to the bank for that purpose (Tr. 1498). There was no testimony, however, as to who owned the $70,000. At appellant's instructions she drew and delivered to appellant a certified check dated January 4, 1945, for $84,000, payable to the Oakland Title Insurance & Guaranty Co. (Exh. 235), which title company was handling the escrow transaction for the purchase of the property located at 5000 Broadway, Oakland, and known as "The Quarry" (testimony of Dana E. Bremner, Tr. 238, et seq.). Based on the above evidence, the Government charged the entire $70,000 to appellant. *But the subsequent developments appearing from the Government's own evidence dispels any reasonable inference that the $70,000 was appellant's money, and, on the contrary,* identifies the $70,000 with Howard Chang, not appellant. On Feb-

ruary 14, 1946, the said title company returned $26,-500 to Howard Chang (see Exh. 163), which was deposited in the above account on February 16, 1946 (Exh. 239, page 5). (See testimony Bremner, Tr. 242.) On March 25, 1946, Mrs. Chang drew a check on the account for $28,000 payable to the order of Bock Hing Trading Corporation. On direct examination she said she did this either at her husband's or appellant's direction (Tr. 1500); on cross-examination she admitted to having testified at the first trial that it was upon her husband' direction (Tr. 1507-8). On Government's Exhibit 223, page 2, being a financial statement of Bock Hing Trading Corporation at April 3, 1946, is found under liabilities "Loans from others * * * C. C. Wong * * * $28,000". She further testified (Tr. 1500) that she drew a check dated December 9, 1946, at her husband's direction, payable to her husband's company, United Trading Corp., and deposited to its account, which account significantly Howard Chang maintained at the Pacific National Bank (see Exh. 243).

It thus appears that: first, the bank account in question was not appellant's; secondly, $30,000 of the $100,000 (paragraphs (a) and (b) above) were not traceable to appellant at all; thirdly, although appellant had possession of the $70,000 (paragraph (c) above), there is no evidence at all as to the ownership of this money, and $26,500 of it was subsequently returned to Howard Chang, not appellant; fourthly, the funds from the bank account were being used in furtherance of negotiations by or on behalf of C. C.

Wong for the purchase of the property located at 5000 Broadway and known as "The Quarry". This last appears from the Government's own evidence (Exh. 245 and 246), the latter of which, in an attached agreement between Gerdon Land Co. and C. C. Wong, dated February 1, 1946 (notably subsequent to the incidents referred to in (a), (b) and (c) above), shows the original negotiations by C. C. Wong for the purchase of the property and the subsequent completion thereof by Gerdon Land Co.

On any reasonable application of the principle of "logical relevancy", the above evidence (including exhibits) together with the preliminary testimony of Mr. Clarke on the bank records (Tr. 1457 et seq.), Mr. Bremner on the title company records (Tr. 238 et seq.) and the witnesses Banker (Tr. 704 et seq.) and Ogilvie (Tr. 720 et seq.) on the real estate negotiations, had not been connected up with appellant or any of the issues and should have been stricken. It had no part in the case.

Its retention in evidence was prejudicial to appellant. Not only did such evidence permit Government's witness Brady to take into account in his net worth calculations an extremely large sum of money ($100,000), but the jury would obviously be impressed by the evidence, since, considered as an integrated transaction, *it involved the largest single item of net worth increase in the entire calculation.*

5. The Court erred to the prejudice of the appellant in admitting in evidence testimony of the witness George Gibbons pertaining to trips made at appellant's direction (Specification No. 13).

George Gibbons, called as a witness by the Government, identified himself as a "bodyguard, chauffeur, Jack-of-all-trades" for appellant over a period in excess of twenty years (Tr. 195). On direct examination (Tr. 196) he stated his duties were to make change for the Wai Yuen Club, appellant's gambling enterprise. On cross-examination (Tr. 210-11) he acknowledged that these gambling activities were conducted at different locations from time to time. He further stated on direct examination that at appellant's direction he made trips to the Hollywood Club in Watsonville in 1945—"if it was open, I did" (Tr. 199); to Bakersfield at an unidentified time and year (Tr. 199); to Alviso, during an unidentified year (Tr. 200); to 103 Yosemite Avenue in the year 1945 "if it was open, yes, sir. If it wasn't I don't think so" (Tr. 201); to 3600 San Pablo, Emeryville, to see a place that was being remodelled (Tr. 202); but he never visited the Hollywood Club at 204 San Pablo, Emeryville or the Hollywood Club in Yosemite (Tr. 206-7). On cross-examination, this witness could not state and would not place the year 1945 as the time when he visited Watsonville (Tr. 213), Alviso (Tr. 214), or Bakersfield (Tr. 215). He observed no gambling either in Alviso or Bakersfield (Tr. 215).

It is apparent that the Government's purpose was to show appellant conducted gambling on a wide scale in 1945. This in accordance with the prosecutor's

opening statements (Tr. 97) that "in the year 1945 which is the year we are concerned with, the defendant operated some eleven gambling establishments" and that "the gambling places were located at various spots in San Mateo County, San Francisco, Contra Costa, Bakersfield, Santa Cruz and other places".

In his net worth summary, Government witness Brady included as seven separate items each of the above locations and in each instance gave the record reference of Gibbons' testimony as justification for so doing (see Exh. 339). Immediately below them Brady inserted the following item: "Bank Roll—Cash for above Clubs".

It is clear from the record that Gibbons did not visit Watsonville, Bakersfield, Alviso, or the Hollywood Club in Emeryville at all in 1945. There is absolutely no evidence in the record that any gambling activity or club was conducted by appellant during 1945 at the above four places or at 3600 San Pablo. Gibbons never visited Hollywood Club at 204 San Pablo at all, yet that is also included in Exhibit 339, *significantly with the page reference to Gibbons' testimony omitted.*

All in all, it was beyond doubt that the prosecutor had failed in his promises of proof (Tr. 97 and supra). The Wai Yuen Club's gambling activity at The Palms was never an issue (cf. testimony Overstreet, Tr. 175-6), and the raid at Yosemite Ave. was never shown to be in connection with a second or separate club. David Shew, the Government's witness and the accountant who kept the books of the

Wai Yuen Club, testified it was one and the same club at different locations (Tr. 880-1).

At the basis of all this, therefore, was the testimony of Gibbons, which should have been stricken (motion made and denied, Tr. 1944-5) when at the end of the Government's case in chief its irrelevancy appeared beyond any question. The prejudicial effect of this ruling is incalculable. The jury were clearly left with the impression of a far-flung gambling empire, with a courier transporting mysterious packages ("I would generally get a package of money—I don't know what it was. It was supposed to be money"—Gibbons, Tr. 199) of profits on a magnificent scale. More unfavorable, was the implication from this evidence that appellant had concealed the income from these several establishments, an aspect given further emphasis by the Court's charge to the jury dealing with their consideration of the evidence pertaining to the "practice of gambling" (Tr. 2087; see Argument I, No. 4, supra).

6. The Court erred in permitting Government witness Brady to assume facts contrary to the evidence (Specification No. 14).

Augustus V. Brady, a witness for the Government, was a technical adviser assigned to the Penal Division of the Bureau of Internal Revenue (Tr. 1783). He was by profession an accountant. On direct examination, he identified a number of so-called charts (Exh. 280-82 incl., 337-342 incl., 344, 345 and 347) which he had prepared at the "direction" and "request" of the prosecutor. He stated that the data which he had summarized on the charts was data

that he had secured from evidence given at appellant's trial.

Of the above exhibits, No. 337 was offered first, to which appellant objected at length (Tr. 1801-2), including, among other grounds, that the exhibit was "based upon assumptions of facts or inferences from facts which are not in evidence" and that the document was "incompetent, irrelevant, immaterial, prejudicial and basis for improper examination of the entries." The Court permitted appellant's counsel to make the same objection by reference, upon the offer of all of the remaining exhibits above mentioned and to the testimony of Mr. Brady in explanation of his charts. All objections to all exhibits and explanatory testimony were overruled.

On cross-examination Mr. Brady admitted that the basis of the inclusion of each entry of every chart and supporting schedule he prepared was a direction to him by counsel for the Government to put the entry on the paper (Tr. 1872).

Uncontradicted evidence assembled under Specifications Nos. 10, 11 and 12 (Argument II, No. 4, supra) demonstrated that appellant was not connected up with the Howard and Evelyn Lee Chang trustee account, yet Mr. Brady charged appellant with $100,000 in appellant's closing net worth (Tr. 1908).

Uncontradicted evidence assembled under Specification No. 13 (Argument II, No. 5, supra) demonstrated that Brady used Gibbons' testimony as the basis for his gambling club items on Exhibit Number 339 and in part for his item on "Bank Roll—Cash for above Clubs." On cross-examination (Tr. 1896

et seq.), he stated he was instructed to put $50,000 in the balance sheet, at both beginning and end of the year 1945, and that the set of entries on Exhibit Number 339 *meant there were a number of clubs in operation some time during 1945,* but they had a bank roll of $50,000 (Tr. 1896). He could find no justification for this in the evidence, and in the course of his cross-examination testified: "I believe it is up to the jury, *I put down what I was instructed to.* This I think represents the Government's viewpoint of the case" (emphasis ours; Tr. 1898). The Overstreet testimony to which Brady referred on his chart (Exh. 339) pertained to the Wai Yuen cash in the sum of $47,259.40 seized by the authorities in a raid on the Wai Yuen Club on February 4, 1945 (Tr. 173). Some basis of relevancy would sanction the use of this amount at the beginning of 1945 (there being no great remoteness) but not at the end of 1945, since the club had been closed for the last three months of the year (Tr. 914). The net results of this was to arbitrarily add approximately $50,000 to appellant's income on a net worth basis.

Evidence, introduced by the Government in Exhibit Number 186, a balance sheet for the Wai Yuen Club at December 31, 1945, prepared by David Shew, showed an increase in liabilities of the club of $16,000 during 1945 together with a liability for withholding tax in the sum of $5,219.80, making a total increase of liabilities in the sum of $21,219.80. In his calculations, Mr. Brady ignored this sum entirely, the net effect of which was to add another $21,219.80 to appellant's income on a net worth basis.

The effect of admitting Mr. Brady's documents and explanatory testimony, in the light of the above three instances of his assumptions contrary to the evidence ("I put down what I was instructed to", supra), was prejudicial to appellant. *The above three items represented a total of $171,219.80 in net worth increase, and thus net income of appellant on this reconstructed basis. This was the very heart and substance of the net worth case.*

The inclusion by Mr. Brady of the foregoing data on these three items in his balance sheets (as well as the erroneous admission of the Chang Trustee account evidence—see Argument II, No. 4, supra) was prejudicial to appellant. Other serious conflicts between the Government and appellant existed: for example, on "Account 20 Gerdon Land Co.", the Government's increase was $70,962.08 (see Exh. 339, item 2), whereas defense increase was only $29,655.39 (Exh. DD, item 3), a difference of $41,306.69 (it will be recalled that the Government's evidence here was based on Wiley's and Wallace's naked opinions of the character of Account 20—evidence erroneously admitted—see Argument II, No. 2, supra); as well as other smaller items such as the Wai Lee Co. and the Bock Hing Trading Co. The $171,219.80 included by Mr. Brady represented not only the most substantial part of the increase, but arose out of transactions (large real estate investment and gambling) which would be more likely to impress the jury. If this had not been included, it is very likely that the jury would feel that the net worth analysis was not unfavorable to appellant, and, in turn, *not having confirmed the*

Government's first method of proof, would have cast great doubt on the results therein reached. The Bureau of Internal Revenue frequently employs the net worth-expenditures method in an attempt to substantiate the results of other methods of audit. (See testimony Brady, Tr. 1869-70). If the Government here had failed to substantiate its other method, such failure would undoubtedly have had a great bearing on the issues to be determined by the jury.

Finally, any such net worth method falls and is worthless to prove anything, unless all of the assets of the taxpayer are accounted for at the time of the opening net worth (here December 31, 1944). *United States v. Fenwick,* supra, at p. 492; *United States v. Chapman,* supra, at p. 1001; *Bryan v. United States,* supra; *Brodella v. United States,* supra, at p. 824. Yet here Brady admitted that he had not taken into account in his net worth analysis several items identified in appellant's tax returns which might have had a direct bearing on appellant's opening net worth. This again, we respectfully suggest, points up the necessity of having the jury adequately charged on the net worth method and the prejudicial error committed by the Court in refusing to give appellant instructions on that subject (See Argument I, No. 2, supra).

These errors in the admission of evidence, considered individually and collectively, may well have been decisive of the case. Certainly they cannot be disregarded "as without probable substantial influence

upon the verdict of the jury." *Wolcher v. United States* (1952), 9 Cir., 200 F. 2d 493, 499. See also, *Kotteakos v. United States,* 328 U.S. 750, 764, 66 S. Ct. 1239, 1248, 90 L. Ed. 1557, 1566-1567. As this Court said in the *Wolcher* case, supra, at page 500, "The errors here listed require a reversal since in our judgment 'the error might have operated to the substantial injury of the defendant.' *United States v. Grady,* 7 Cir., 185 F. 2d 273, 275."

III. DENIAL OF MOTION FOR NEW TRIAL.

1. The Court's denial of the appellant's motion for a new trial was a manifest abuse of discretion (Specification No. 21).

It is our contention, finally, that in light of the various rulings of the trial Court, as discussed hereinabove, in connection with the instructions to the jury and the admission of evidence, the refusal of the Court to grant a new trial constituted a clear abuse of discretion. *Cavness v. United States* (1951), 9 Cir., 187 F. 2d 719, 722, cert. den. 341 U.S. 951, 71 S. Ct. 1019, 95 L. Ed. 1374; *United States v. Hayes* (1949), 9 Cir., 172 F. 2d 677, 678; Rule 33, Federal Rules of Criminal Procedure.

CONCLUSION.

We have shown that the trial Court committed numerous errors in giving instructions to the jury and in refusing to give other instructions. Some of the erroneous instructions thus given pertained to such vital matters as criminal intent and the priv-

ilege against self-incrimination. It would be hard to conceive of errors which could more seriously affect the substantial rights of the accused in a criminal case. The instructions refused by the Court embodied the settled principles of law applicable to the net worth-expenditures method of proof, and without such instructions in a complicated case of circumstantial evidence, the jury could not fairly consider the evaluate the evidence on this issue. Furthermore, the instructions as a whole were unbalanced and prejudicial.

In addition, we have shown that the Court made numerous harmful errors in admitting evidence, both oral and documentary, which in some instances served to accentuate the erroneous rulings in connection with the instructions to the jury.

In justice to this appellant, we urge that the judgment of conviction be reversed.

Dated, San Francisco, California,
June 15, 1953.

Respectfully submitted,
WILLIAM M. MALONE,
RAYMOND L. SULLIVAN,
WILLIAM B. WETHERALL,
CONRAD T. HUBNER,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

GOVERNMENT'S NET WORTH STATEMENT AS AT DECEMBER 31, 1944 AND DECEMBER 31, 1945.

(Government's Exhibit 339.)

HN LIM MOW

San Francisco, Calif.

NET WORTH STATEMENT AS AT DECEMBER 31,

ASSETS		1944	1945
as in Banks & On Hand –	Separate Schedule	127,947.31	144,030.91
ccunt 20 Gerdon Land Co.	Exh. 56	248,143.43	319,105.51
is llaneous Deposits –	Separate Schedule	26,000.00	22,000.00
S Government Bonds –	Exh. 274	56.25	6,056.25
lans against Wilbur Pierce –	Farley – Exh. 257	17,509.47	20,935.07
m ican Distilling Co. Stock –	Wiley – Exh. 10	61,000.00	61,000.00
Va Yuen Club –	Separate Schedule	22,081.55	37,658.19
i Son Co. –	Exh. 58	1,000.00	1,000.00
Ve ern Supply Co. –	Wiley – Exh. 302	500.00	500.00
ni d Trading Corpn. –	Evelyn Lee Chang – Exh. 242	10,000.00	10,000.00
ni d Food Supply Co. –	Evelyn Lee Chang – Exh. 242	23,937.71	23,937.71
Va Lee Co. –	Separate Schedule	5,641.56	12,834.11
ar arin Hotel –	Exh. 258	5,477.00	1,090.47
ie an Hotel –	Exh. 259	2,251.41	2,177.56
pie Hotel –	Exh. 260	4,306.78	5,953.19
y ore Auto Court –	Exh. 261	982.20	3,069.39
in ran Hotel –	Exh. 262	—	3,054.21
it Company –	Exh. 270	53,630.00	43,800.00
er Building –	Exh. 316 & Wallace	45,622.41	45,283.43
a Estate Holdings –	Separate Schedule – Exh. 264	278,475.43	565,228.94
es rn Dept. Store Stock –	Exh. 1 – 1945 Return	3,420.97	—
el Hing Trading Corpn. –	Exh. 223 – Exh. 224	—	3,848.45
at nville –	Gibbons p. 116	X	X
k sfield –	Gibbons p. 119	X	X

Alviso –	Gibbons p. 118	X	
Yosemite Club –	Gibbons p. 120	X	
Hollywood Club –	Gibbons	X	
3600 San Pablo, Emeryville –	Gibbons p. 120	X	
The Palms	Gibbons p. 115	X	
Bank Roll – Cash for above Clubs –	Overstreet –	50,000.00	50,0
Lions Den –	1947 Return – Exh. 283	25,000.00	25,0
Cash Surrender Value of Life Insurance –	Stipulated – Exh. 312	26,771.54	31,6
⅛ Interest Mandarin T Theatre –	Hogan p. 582	10,500.00	10,5
	Total Assets	1,050,255.02	1,449,7
LIABILITIES			
Real Estate Loans on Separate Schedule –	Stipulated – Exh. 311	112,449.76	265,0
Loans on Life Insurance –	Stipulated – Exh. 312	18,703.40	20,0
Reserve for Depreciation –	Exh. 265	32,628.49	44,
Hogan & Vest Loan –	Hogan p. 587	—	5,0
	Total Liabilities	163,781.65	334,
Net Worth –		886,473.37	1,115,

APPELLANT'S STATEMENT OF NET WORTH AS AT DECEMBER 31, 1944 AND DECEMBER 31, 1945.

(Defendant's Exhibit DD.)

Schedule 1

Chin Lim Mow

Statement of Net Worth

December 31, 1944 and December 31, 1945

Assets	1944	1945	Reference
k ccounts	$107,352.09	$ 54,162.98	Schedule 2 – A
–so l cash on hand	58,396.85	None	" – B
1 do Land Co. account	208,623.42	238,278.81	Exh. BS
cel neous accounts and ai s receivable	129,447.18	118,872.78	Schedule 2 – C
os s	25,500.00	4,500.00	" – D
s rrender value – e surance	26,771.54	31,664.43	Exh. 312
ri es	3,477.22	6,056.25	Schedule 2 – E
– e ate	301,969.35	576,404.09	" – F
s en	25,000.00	25,000.00	Exh. 283
a Co. – partnership interest	13,911.69	18,261.86	Schedule 2 – G
Y n Club	37,140.95	(15,561.61)	" – H
L Co.	1,333.40	3,208.53	Exh. 282
C.	20,100.00	15,000.00	Exh. 270
m o. – partnership interest	1,000.00	1,000.00	Wiley
e Supply Co. – r ership interest	500.00	500.00	Wiley
	$960,523.69	$1,077,348.12	
ia lities & Net Worth			
es te loans	$112,449.76	$ 265,066.71	Exh. 311
s life insurance	18,703.40	20,021.68	Stipulation – Exh. 3
n Vest Loan	None	5,000.00	Hogan p. 587
o l liabilities	$131,153.16	$ 290,088.39	
NET H	829,370.53	787,259.73	
	$960,523.69	$1,077,348.12	

Increase in net worth between 1944 and 1945	($42,110.80)	
ADD: Non-deductible expenses	58,782.73	Exh. 342
	$16,671.93	
LESS: Non-taxable income	16,550.51	Exh. 342
Taxable net income on net worth basis – year 1945	$ 121.42	
Net income reported by Chin Lin Mow and wife	54,341.66	Exh. 1 & 2
Over-reported income for the year 1945 on the basis of net worth	$54,220.24	

NOTE: For lack of evidence, the foregoing assets show no value for the defendant's interest in American Four Co. and Hing Wah Tai Co.

SPECIFICATION OF ERROR NO. 10.

Amplification thereof by a summary of the bank ledger cards of the Pacific National Bank of San Francisco pertaining to an account for "Howard Chang, Trustee, or Evelyn Lee Chang, Trustee, 416 Jackson Street, San Francisco 11, Calif.", which said cards are Exhibit 239 in evidence.

So that the contents of Exhibit 239 will be easily available to the reader, and because it is felt that the reproduction of the 15 ledger sheets, most of which have only one entry thereon, would encumber the appendix, we have summarized the entries as follows:

Checks	Date	Deposit	Balance
	Oct 9 '45	$30,000.00	
$15,000.00	Oct 10 '45		
12,500.00	Oct 11 '45		
	Oct 31 '45		$ 2,500.00
5,000.00	Nov 1 '45		
	Nov 3 '45	23,832.00	
12,500.00	Nov 13 '45		
	Nov 19 '45	8,668.00	
	Nov 30 '45		17,500.00
	Dec 31 '45		17,500.00
	Jan 3 '46	70,000.00	
84,000.00	Jan 4 '46		
	Jan 31 '46		3,500.00
	Feb 16 '46	26,500.00	
	Feb 28 '46		30,000.00
28,000.00	Mar 25 '46		
	Mar 30 '46		2,000.00
	Apr 30 '46		2,000.00
	May 31 '46		2,000.00
	Jun 29 '46		2,000.00
	Jul 31 '46		2,000.00
	Aug 31 '46		2,000.00
	Sep 30 '46		2,000.00
	Oct 31 '46		2,000.00
	Nov 30 '46		2,000.00
2,000.00	Dec 10 '46		
	Dec 10 '46		.00

SPECIFICATION OF ERROR NO. 9.

Amplification thereof by portions of the record of the redirect examination by the Government of the witness William A. Wallace, appearing in the Transcript, vol. IV, pp. 1414-1418.

"Q. Now, I will direct your attention to your testimony of Monday, September 29th, and these questions and these answers:

Mr. Sullivan. May I have the page?

Mr. Fleming. 1345.

'Mr. Wallace, tell us just about the conferences that you personally attended with Mr. Wiley and Mr. Peffers. Please confine your remarks to that, and based upon that will you kindly tell me how many there were, to the best of your recollection?

A. There were two that I recall in which the matter of the various partnerships were discussed, and the final discussion was had with Mr. Wiley, and at that time he suggested that one family partnership be set up and the pro rata of the income be based on the amount of the services the members of the family gave to the partnership, and that matter was discussed, I believe, with the attorneys for Mr. Chin and Mr. Chin the outcome being that this new partnership in 1946 was started.

Q. Isn't it a fact that you advised Mr. Chin to follow the recommendation of Mr. Wiley in this instance?

A. Yes, I believe it was. I believe Mr. Allen, the attorney, was part of the—was there at the time the meeting was held, too, or along about that period.

Q. At any rate, this idea of the 1946 partnership did not originate with Mr. Chin, did it?

A. No, it did not.'

Do you recall that testimony?

A. Yes.

Q. Now, is it your testimony that you discussed the matter of 1946 partnerships with Mr. Chin Lim Mow and with Mr. Wiley?

A. I believe we did.

Q. Well, did you?

A. Yes.

Q. Do you recall making a statement on October 18, 1949, at which were present Frank Filice, Merwyn Freeberg, William A. Wallace, Samuel C. Peffers, and Helen B. Shirley? Do you recall that?

Mr. Sullivan. I object to the question as an attempt by the government to impeach their own witness.

The Court. Objection overruled.

Mr. Sullivan. I object upon the further ground there is no foundation for the impeachment question.

The Court. Lay the foundation.

Mr. Fleming. This question is directed to further development of the testimony I have just read.

The Court. Ask for the time, place and persons present. I believe you have asked that, though, haven't you? Mr. Filice and Mr. Freeberg were present. Ask the date.

Q. (By Mr. Fleming). Do you recall the date of that statement?

A. I don't recall what the item was. What is the item you refer to, Mr. Fleming?

Mr. Fleming. I will ask that this document be marked Government's Exhibit No. 57 for identification.

The Court. It will be received and marked.

The Clerk. It has already been marked.

Q. (By Mr. Fleming). I will show you exhibit 57, for identification, and ask you if you can identify that as your signature attached to the statement?

A. Yes.

Q. Now, I will direct your attention to page 16 of the document, and direct your attention to the questions and answers on that page. Have you read those, Mr. Wallace?

A. This——

Q. Just let me know when you have read that page.

A. Yes, I have read it.

Q. Will you refer to the previous page and tell me whether or not page 16 relates to Admay?

A. Apparently it does.

Q. Will you satisfy yourself that it actually does?

A. Yes, I have read it.

Q. Now, on October 18th, 1949, were you under oath and asked this question and did you give this answer:

'Mr. Wallace, did you file a return for this alleged partnership for the year 1946?

A. No.

Q. Will you please explain why, according to your best recollection, a return was not filed for the year 1946?

A. No discussion was had with me as to why it was not filed. As I understand it, the matter was discussed with Mr. Peffers.'

Were you asked that question and did you make that answer on that date?

Mr. Sullivan. I object to this, if your Honor please, upon the ground that it is an attempt by

the government to impeach its own witness; and that, furthermore, there is no proper or substantial foundation for the asking of the question.

The Court. Objection will be overruled.

Q. (By Mr. Fleming). Were you asked that question and did you make that answer?

A. In this document here?

Q. Those questions I just read.

A. Would you read it again, please?

Q. (By Mr. Fleming). 'Mr. Wallace, did you file a return for this alleged partnership for the year 1946?

A. No.

Q. Will you please explain why, according to your best recollection, a return was not filed for the year 1946?

A. No discussion was had with me as to why it was not filed. As I understand it, the matter was discussed with Mr. Peffers.'

Were you asked that question and did you give those answers?

A. Yes, I did. I had forgotten about the conversation until I checked our files that we did have a discussion with Mr. Wiley at that time about this partnership, this former partnership, and the other was a development, but I didn't quite understand the question at this particular time.

Q. Then the answer you gave in 1949 was incorrect? And the answer you give in 1952 was correct?

A. Yes.

Q. Now, directing your attention to the bottom of the page, Mr. Wallace, the bottom of the page still relates to Admay, does it not, page 16?

A. Which one?

Q. Page 16.

A. Yes.

Q. The last two questions they still relate to Admay? On the same occasion were you asked these questions and did you make these answers:

'Were you asked to do any accounting work in connection with the dissolution of this alleged partnership?

A. No.

Q. Were you consulted about any income tax problems that may or may not have been presented by the plan of dissolution?

A. No.'

Were you asked those questions and did you give those answers?

Mr. Sullivan. I object to that upon the same ground, your Honor, namely, that it is an attempt by the government to impeach their own witness, and that no proper foundation or adequate foundation has been laid for the question.

The Court. Objection will be overruled.

A. I believe those are my answers, yes."

REQUESTED INSTRUCTIONS OF DEFENDANT (Tr. 64-72).

Instruction No. 45.

(Net Worth Method of Proof.)

The Government has attempted to prove its case by what is known as the "net worth and expenditures" method. By this method the Government has sought to prove the amount of the defendant's income during the taxable year 1945 by showing the increase in his net worth during such year and adding to such increase the amount of federal income taxes and pen-

alties, life insurance premiums, and fines paid by him during the year. According to the Government's theory, the total of the net worth increase plus the amount of these particular expenditures during the year represents the amount of taxable income.

In order to establish the increase in net worth during 1945, which is the only year covered by the indictment, the Government has sought to prove the defendant's net worth on December 31, 1941, and using that as a basis or starting point, has sought to prove the defendant's net worth on December 31, 1944, and on December 31, 1945. Thus, by this chain of circumstances, the Government has sought to prove the defendant's net worth at the beginning of the year 1945 and at the close of that year. Proof of this kind, however, is not direct evidence of the defendant's income during the year in question; it is indirect or circumstantial evidence. In order to establish the increase in net worth during the year 1945, the Government must prove the defendant's net worth on December 31, 1941, as well as on December 31, 1944, and on December 31, 1945. And the net worth on each and all of these dates must be established to a moral certainty and beyond a reasonable doubt. If you are not satisfied to a moral certainty and beyond a reasonable doubt as to the amount of the defendant's net worth on December 31, 1941, you must find the defendant not guilty. Likewise, if you are not satisfied to a moral certainty and beyond a reasonable doubt as to the amount of the defendant's net worth at the close of the year 1944 and at the close of the year 1945, you must find the defendant not guilty.

Instruction No. 46.

(Net Worth Method of Proof.)

Where the Government attempts to prove the amount of the defendant's income by the net worth and expenditures method, it must have a starting point, which may be the beginning of the taxable year in question or some prior date. The starting point is a date upon which the Government must establish the basic net worth of the defendant in order to show an increase thereafter. If the starting point is a date prior to the taxable year in question—as in the case before you—the net worth on that date must be adjusted in order to show the net worth at the beginning of the taxable year in question. The burden of proving the starting point net worth, all adjustments, and the net worth at the beginning of the taxable year, rests upon the Government; and all such facts must be established to a moral certainty and beyond a reasonable doubt.

In every case of this kind the starting point must rest upon a solid foundation. The Government's evidence must be so complete and accurate as to leave no reasonable doubt in your minds as to whether all of the defendant's assets have been accounted for. The defendant does not have the burden of proving that some of his assets were omitted from the Government's computation. Essential proof that he had no other assets at the starting point is the cornerstone of the Government's evidence. If that cornerstone is faulty, the whole case for the Government falls. If in

the present case you have a reasonable doubt as to whether the Government has included in its computation of the defendant's net worth on December 31, 1941—the starting point in this case—all of the defendant's existing assets on that date, you must find the defendant not guilty.

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 492;

United States v. Chapman (1948), 7 Cir., 168 F. 2d 997, 1001;

Bryan v. United States (1949), 5 Cir., 175 F. 2d 223;

Brodella v. United States (1950), 6 Cir., 184 F. 2d 823, 824.

Instruction No. 47.

(Net Worth Method of Proof.)

The Government has put into evidence various income tax returns pertaining to taxable years other than 1945. It should again be mentioned, however, that the defendant is here charged with attempting to evade or defeat income tax owing for the year 1945. He is not on trial for any other year or years. It is not enough in this case for the Government to show, even assuming that it has done so, that over a specified period of years—say from 1942 to 1945—the defendant had a total amount of income which exceeded the total income reported in his tax returns for such period of years. Nor would it be enough for the Government to show that during some particular year prior to 1945 the defendant had income

in excess of the amount reported in his tax return for such year. It is incumbent upon the Government to prove to a moral certainty and beyond a reasonable doubt that the defendant's income during 1945, the only year covered by the indictment, was greater than the amount reported in his return for that year, and that he wilfully filed a false and fraudulent income tax return with intent to evade or defeat the tax due the Government for that year. If, in light of the evidence before you, there remains in the mind of any juror a reasonable doubt that the defendant's income for 1945 was greater than the amount reported in his return for that year, or a reasonable doubt that the defendant wilfully filed a false and fraudulent income tax return with intent to evade or defeat the tax due the Government for that year, then it is the duty of such juror to vote for an acquittal.

Instruction No. 48.

(Net Worth Method of Proof.)

In a case such as this, where the Government relies upon the net worth and expenditures method of proving income, the net worth of the defendant at the beginning of the taxable year—here the year 1945—must be clearly and accurately established by competent evidence to a moral certainty and beyond a reasonable doubt.

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 491-492;

Bryan v. United States (1949), 5 Cir., 175 F. 2d 223, 225;

Brodella v. United States (1950), 6 Cir., 184 F. 2d 823, 824;

United States v. Chapman (1948), 7 Cir., 168 F. 2d 997, 1001.

Instruction No. 49.

(Net Worth Method of Proof.)

The Government's evidence concerning the net worth of the defendant at the starting point—namely, on December 31, 1941—must be so persuasive as to exclude from your minds any reasonable hypothesis or possibility that the defendant had assets on that date which are not accounted for by the Government. If in light of the evidence in this case you have a reasonable doubt on this score, it is your duty to return a verdict of not guilty.

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 491-492;

Bryan v. United States (1949), 5 Cir., 175 F. 2d 223, 226-227;

Brodella v. United States (1950), 6 Cir., 184 F. 2d 823, 824.

Instruction No. 50.

(Net Worth Method of Proof.)

In attempting to prove the defendant's net worth at the starting point—that is, on December 31, 1941—it is not sufficient for the Government simply to list the assets and liabilities it knows about. The Government

must prove to a moral certainty and beyond a reasonable doubt that the defendant had no other assets and liabilities on the crucial date. The defendant is not required to show that the Government's net worth computation is incorrect or incomplete. If the evidence in this case leaves any reasonable doubt in your minds as to whether all of the defendant's assets and liabilities are included in the Government's computation of his net worth on December 31, 1941, it follows that you may not rely upon such computation and you must find the defendant not guilty.

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488;

Bryan v. United States (1949), 5 Cir., 175 F. 2d 223.

Instruction No. 51.

(Net Worth Method of Proof.)

Before you may accept the Government's theory of this case, you must be satisfied to a moral certainty and beyond a reasonable doubt that the defendant's income for the year 1945, as computed by the net worth and expenditures method, actually represents taxable income for that year and not for some prior year or years. It is not incumbent upon the defendant to prove that the income so computed was accumulated prior to the year 1945.

See:

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 492.

Instruction No. 52.

(Net Worth Method of Proof.)

"* * * Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt. Evidence of mere probability of guilt, of course, is not sufficient."

Quoted from:

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 490.

Instruction No. 53.

(Net Worth Method of Proof.)

"* * * when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived * * *. The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate."

Quoted from:

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 491.

See also:

Bryan v. United States (1949), 5 Cir., 175 F. 2d 223, 225;

Brodella v. United States (1950), 6 Cir., 184 F. 2d 823, 824;

United States v. Chapman (1948), 7 Cir., 168 F. 2d 997, 1001.

Instruction No. 54.

(Net Worth Method of Proof.)

"Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations cannot be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to

be undependable as proof of guilt beyond all reasonable doubt."

Quoted from:

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 492.

Instruction No. 55.

(Defendant's Assets.)

Before you may consider any evidence of any assets belonging to the defendant in computing his net worth, you must first find to a moral certainty and beyond all reasonable doubt that such assets were acquired and paid for by the defendant in the applicable year and you must also find to a moral certainty and beyond all reasonable doubt the cost to the defendant of such assets.

No. 13654

United States Court of Appeals

for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

GERALD J. TRUBOW,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-9-53

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

CHAUNCEY TRAMUTOLO, ESQ.,
United States Attorney.

FREDERICK J. WOELFLEN, ESQ.,
Assistant United States Attorney,
San Francisco, California,
Attorneys for Appellant.

BEN K. LERER, ESQ.,
655 Mills Tower,
San Francisco, California,
Attorney for Appellee.

In the District Court of the United States,
for the Northern District of California
(Southern Division)

No. 29,077—H

GERALD J. TRUBOW,

Plaintiff,

vs.

UNITED STATES OF AMERICA, FIRST DOE, SECOND DOE, THIRD DOE, BLACK & WHITE COMPANY, a copartnership, and RED COMPANY, a corporation,

Defendants.

COMPLAINT UNDER FEDERAL TORT CLAIMS ACT

Now comes the plaintiff and for cause of action alleges:

I.

That the names of the defendants sued herein as First Doe, Second Doe, Third Doe, Black and White Company, a copartnership, and Red Company, a corporation, are fictitious names and said defendants are so impleaded for the reason that plaintiff does not know their true names and plaintiff prays leave that when the true names of the said defendants are ascertained that he may be permitted to amend this complaint to insert the same herein, together with appropriate allegations respecting the connection of said defendants in this action.

II.

That at all times herein mentioned this action is brought pursuant to the provisions of the Federal Tort Claims Act effective August 2, 1946, being titled Four, Public Law 601, Chapter 753, 79th Congress, 2nd Session.

III.

That at all times herein mentioned said defendant United States of America was the owner and in possession and having control of those certain premises, together with the building and improvements thereon, known and designated as the Marine Hospital, located in the vicinity of 14th Avenue and Lake Street in the City and County of San Francisco, State of California, hereinafter referred to as said "Marine Hospital"; that said land and building was known and there used and maintained by the said defendant United States of America as a hospital;

IV.

That at all times herein mentioned, the Scrap & Metal Company of San Francisco had an agreement with the defendants herein whereby the employees of said Scrap & Metal Company were to enter upon the premises of said defendants for the purpose of picking up certain refrigerators and beds and for the removal of the same.

V.

That at all times herein mentioned the plaintiff herein was acting within the full scope of his employment as an employee of said Scrap & Metal Company of San Francisco, occupying the position

of foreman thereof, and carrying out the terms of said agreement hereinabove referred to with the said defendants in the status of foreman.

VI.

That at all times herein mentioned the general public, visitors and business visitors were invited and permitted upon the premises of said Marine Hospital and to use the elevator and freight elevator located in said Marine Hospital, hereinafter referred to as said "freight elevator".

VII.

That at all times herein mentioned the defendants maintained, controlled, operated the said freight elevator which the said visitors and patrons and business visitors of said hospital were invited by said defendants to use.

VIII.

That on or about the 22nd day of April, 1949, at or about the hour of 2:30 o'clock p.m., said plaintiff was upon the premises of said Marine Hospital in the capacity of foreman for the Scrap & Metal Company of San Francisco, pursuant to the agreement hereinabove referred to whereby said plaintiff was to supervise the picking up of certain refrigerators and beds and for the removal of the same; that in pursuance thereof it was necessary for the plaintiff to use a certain freight elevator located on said Marine Hospital premises; that said plaintiff was using the said freight elevator with the

permission and invitation of the said defendants; that on or about the said 22nd day of April, 1949, plaintiff after entering on the said premises of the said defendant for the purposes hereinabove referred to, and while plaintiff was using the freight elevator hereinabove referred to, at the invitation of the said defendants as aforesaid, the defendants so negligently and carelessly constructed, maintained, operated and controlled said freight elevator, and the doors of said freight elevator, that the said upper and lower doors of the said freight elevator came together with such force and violence and speed as to cause the plaintiff to catch his right hand between the said doors of said elevator, causing the right hand of said plaintiff to sustain an oblique fracture through the distal end of the shaft of the third metacarpal and bruising said plaintiff about his body and shaking him up internally and causing said plaintiff to suffer intense pain and made said plaintiff unable to attend to his business.

IX.

Plaintiff is informed and believes and therefore alleges that the injuries so sustained are permanent in nature.

X.

That the negligent and careless manner in which the said defendants constructed, maintained, con- immediate and proximate cause of the injuries received by the plaintiff.

XI.

That by reason of the carelessness and negligence of the defendants as aforesaid, and by reason of the injuries so sustained, said plaintiff has necessarily incurred liability for the services of a physician and surgeon in an amount not capable of being fixed or determined at this time, and plaintiff here prays leave that when the said amount is fixed and determined that he may be permitted to amend this complaint to insert the amount thereof.

XII.

That by reason of the carelessness and negligence of the defendants as aforesaid, and by reason of the injuries so sustained, said plaintiff has necessarily incurred liability for x-rays in the sum of Fifteen Dollars ($15.00), which is a reasonable charge therefor, and of which no part of the whole of said sum has been paid. Plaintiff is informed and believes that there will be further x-rays and prays leave of Court to amend accordingly when the exact amounts are ascertained.

XIII.

That by reason of the carelessness and negligence of the defendants as aforesaid, and by reason of the injuries so sustained, plaintiff was further injured in general damages in the sum of Twenty Thousand Dollars ($20,000.00), of which no part or the whole of said sum has been paid.

XIV.

That plaintiff was at the time of said injuries employed as the foreman of the Scrap and Metal

Company in San Francisco and was earning the sum of Four Hundred Dollars ($400.00) per month; that as a result of said injuries the plaintiff has been unable to work since said time on account of the injury to his right hand, and has been damaged thereby in the sum of Four Hundred Dollars ($400.00) per month since the date of said injury, and that he will continue to be damaged at the rate of Four Hundred Dollars ($400.00) per month for an indefinite time in the future which plaintiff is unable to state at this time.

XV.

Wherefore, plaintiff prays judgment against defendants for the sum of Twenty Thousand Dollars ($20,000.00) general damages; One Thousand Six Hundred Dollars ($1,600.00) loss of earnings; for the expense incurred for x-rays when the amount is ascertained, and for the liability incurred for the services of a physician and surgeon when the same is ascertained, and for such other and further relief as the Court may deem meet and proper in the premises.

/s/ BEN K. LERER,
Attorney for Plaintiff.

State of California,
City and County of San Francisco—ss.

Gerald Trubow, being first duly sworn, deposes and says:

That he is the plaintiff in the foregoing complaint; that he has read the same and knows it to

be true of his own knowledge except as to matters stated therein on information or belief and as to those matters that he believes it to be true.

/s/ GERALD TRUBOW.

Subscribed and sworn to before me this 22nd day of July, 1949.

[Seal] /s/ GERALDINE D. COHEN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires January 11, 1953.

[Endorsed]: Filed August 17, 1949.

[Title of District Court and Cause.]

NOTICE AND MOTION TO DISMISS

Comes now Frank J. Hennessy, United States Attorney for the Northern District of California, Southern Division, and moves on behalf of the defendant, United States of America, that this action be dismissed on the ground that the Federal Tort Claims Act does not authorize the maintenance of suits against the United States and other parties.

Said motion will be made on Monday the 16th day of January, 1950, at the hour of 10:00 a.m. thereof, before Honorable Louis E. Goodman, and will be based upon all the papers, records and files

in this action and upon the ground that only the United States can be sued in tort.

Respectfully submitted,

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant United States of America.

Points and Authorities

Federal Tort Claims Act, Public Law 601, Title 4.

[Endorsed]: Filed January 10, 1950.

[Title of District Court and Cause.]

DISMISSAL WITHOUT PREJUDICE

To the Clerk of Said Court:

You are hereby authorized and directed to enter dismissal of the above entitled action as against defendants, First Doe, Second Doe, Third Doe, Black & White Company, a co-partnership, and Red Company, a corporation, Only, without prejudice.

Dated: January 11, 1950.

/s/ BEN K. LERER,
Attorney for Plaintiff.

[Endorsed]: Filed January 13, 1950.

[Title of District Court and Cause.]

ANSWER

Now comes the defendant and answering the complaint herein, denies and alleges as follows:

I.

Denies all the allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV.

For a further and separate answer this defendant alleges:

I.

That the injury alleged in paragraph VIII of the complaint herein was proximately caused by the negligence and carelessness of the plaintiff herein and that plaintiff was himself careless and negligent in and about all the matters complained of herein.

For a further and separate answer this defendant alleges:

I.

That plaintiff herein had the status of a licensee and came on the premises and into the elevator referred to in paragraph VI of said complaint for purposes of his own, thereby assuming all of the risks incident to the condition of the premises.

And for a further and separate answer this defendant alleges:

I.

That the defendant United States of America

owed the plaintiff herein no duty of care in and about all of the matters complained of herein.

Wherefore the plaintiff prays that the complaint be dismissed and that it have its costs incurred herein.

/s/ FRANK J. HENNESSY,
United States Attorney,
/s/ By CHARLES O'GARA,
Asst. United States Attorney,
Attorneys for Defendant,
United States of America.

[Endorsed]: Filed March 31, 1950.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

The court finds that plaintiff is entitled to judgment for the following amounts:

Loss of earnings	$ 400.00
Services of physician and surgeon	193.49
X-rays	15.00
General damages for personal injuries	2,000.00
Total	$2,608.49

Findings of fact, conclusions of law, and judgment thereon in accordance with the foregoing to be prepared by plaintiff.

Dated: January 16, 1951.

/s/ OLIVER J. CARTER,
U. S. District Judge.

[Endorsed]: Filed January 16, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 5th day of January, 1951, before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury; Charles O'Gara, Esq., Assistant United States Attorney, appearing on behalf of defendant, and Ben K. Lerer, Esq., appearing on behalf of plaintiff; oral and documentary evidence having been introduced on behalf of both parties; and the court, having duly considered the facts and the law, now makes the following:

FINDINGS OF FACT

1. All of the allegations of paragraphs II, III, VI, VII, IX, X, XI and XII of the first cause of action of plaintiff, Gerald J. Trubow, as set forth in the complaint on file herein, are true, and all of the allegations of paragraphs IV, VIII and XIV of said cause of action, as amended in open court, are true.

2. As a result of the negligence of the defendant mentioned in the complaint on file herein, plaintiff was injured and damaged in the sum of Two Thousand Six Hundred Eight Dollars and forty-nine cents ($2,608.49).

3. The attorney for plaintiff is entitled to attorney's fee in the sum of Five Hundred Twenty

One Dollars and seventy cents ($521.70), which sum is not in excess of twenty per cent (20%) of the amount recovered by plaintiff, and which sum is a reasonable attorney's fee.

From the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

1. Plaintiff is entitled to judgment against the defendant in the sum of Two Thousand Six Hundred Eight Dollars and forty-nine cents ($2,608.49).

2. Attorney for plaintiff is allowed Five Hundred Twenty One Dollars and seventy cents ($521.70) of the judgment herein, as attorney's fee.

3. Plaintiff is entitled to judgment against the defendant for his costs of suit incurred in this action.

Let judgment for plaintiff be entered accordingly.

Done this 29th day of January, 1951.

/s/ OLIVER J. CARTER,
U. S. District Judge.

Approved this 22nd day of January, 1951.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed January 29, 1951.

In the United States District Court for the
Northern District of California,
Southern Division

No. 29077—H

GERALD J. TRUBOW,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on January 5, 1951 before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury; Charles O'Gara, Esq., Assistant United States Attorney, appearing on behalf of defendant, and Ben K. Lerer, Esq., appearing on behalf of plaintiff; oral and documentary evidence having been introduced on behalf of both parties; and the court heretofore having made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised:

Wherefore, by reason of the law and the findings of fact aforesaid, it is Ordered, Adjudged and Decreed that plaintiff have and recover against the defendant in the sum of Two Thousand Six Hundred Eight Dollars and forty-nine cents ($2,608.49); and

It is further Ordered, Adjudged and Decreed that the attorney for plaintiff be and he is allowed

Five Hundred Twenty One Dollars and seventy cents ($521.70) of the judgment herein as attorney's fee; and

It is further Ordered, Adjudged and Decreed that plaintiff have and recover his costs of suit herein from defendant, amounting to the sum of Twelve Dollars and seventy five cents ($12.75).

Dated: January 29, 1951.

/s/ OLIVER J. CARTER,
U. S. District Judge.

Approved as to form, as provided in Rule 5(d).

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

Entered in Civil Docket Jan. 30, 1951.

[Endorsed]: Filed January 29, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the defendant, United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered by the United States District Court for the Northern District of California in

favor of the plaintiff and against said defendant on January 30, 1951.

Dated: March 16, 1951.

/s/ FRANK J. HENNESSY,
United States Attorney,
/s/ By CHARLES O'GARA,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed March 16, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Defendant, having filed its Notice of Appeal in the above-entitled action, hereby designates the record on appeal as follows:

The entire record in the District Court including the pleadings, motions, orders, transcript, all exhibits, findings of fact, conclusions of law, judgment and notice of appeal.

Dated: May 24, 1951.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,
/s/ By R. A. McMILLAN,
Asst. United States Attorney,
Attorneys for Defendant.

[Endorsed]: Filed May 24, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true copies of orders entered in this Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint under Federal Tort Claims Act.

Notice and Motion to Dismiss.

Dismissal without Prejudice as to "Does".

Answer.

Minutes of January 5, 1951.

Minutes of January 8, 1951.

Minutes of January 12, 1951.

Order for Judgment in Favor of Plaintiff.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Order Extending Time to Docket Record on Appeal.

Designation of Record on Appeal.

One volume of the Reporter's Transcript.

Plaintiff's Exhibits 1 to 6.

Defendant's Exhibits A to N.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 29th day of May, 1951.

[Seal] C. W. CALBREATH,
Clerk.

In the Southern Division of the United States District Court for the Northern District of California

No. 29077-C

GERALD J. TRUBOW,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Hon. Oliver J. Carter, Judge.

REPORTER'S TRANSCRIPT
January 5, 1951

Appearances:

For the Plaintiff: Ben K. Lerer, Esq.

For the Government: Charles H. O'Gara, Esq.

* * * * *

The Court: Yes. Then, Mr. Lerer, if you desire to make a motion to amend your pleadings, I would like to hear your motion and in what manner. Then if there are any objections to be made, Mr. O'Gara, you may make them. Will you proceed, Mr. Lerer? [6*]

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*Page numbering appearing at top of page of original certified Reporter's Transcript.

Mr. Lerer: I take it we stipulate, Your Honor, that paragraph 3 can be admitted; namely, that it is a governmental agency and that the property was held under the ownership and possession and control of the United States of America for the purpose of the record? Can we, Mr. O'Gara?

Mr. O'Gara: Yes, we will stipulate to that.

The Court: That stipulation will be accepted by the Court.

Mr. Lerer: Paragraph 4, Your Honor, we would like to amend to read: "That at all times herein mentioned plaintiff had an agreement with the defendants herein whereby plaintiff could enter upon the premises of said defendants for the purpose of picking up certain refrigerators and for the removal of the same, and at all times herein mentioned plaintiff was an invitee."

The plaintiff was—I should correct that. That should be: "—the plaintiff was an invitee of the defendants." I am excluding there, Your Honor, the word "beds", which through some misunderstanding was included in the complaint. It was my understanding that the plaintiff was going out there to get refrigerators and beds and——

The Court: You are not talking about——

Mr. Lerer: Paragraph 4, Your Honor.

The Court: Oh, paragraph 4.

Mr. Lerer: To pick up certain refrigerators and beds.

The Court: It says that at all times herein mentioned the [7] Scrap Metal Company——

Mr. Lerer: Well, I was getting to that. Num-

ber 1 is to exclude "beds" and also to exclude that part, "that the Scrap Metal Company of San Francisco * * *"

The Court: You want to——

Mr. Lerer: I want to X that out completely, because they were not involved in this case. There is a question involved as to whether he was a foreman for them at the time, but it was subsequently determined that he was acting in his own capacity in partnership with another man.

The Court: You want to strike that, from line 16 of page 2, the words, "and beds"?

Mr. Lerer: Yes, your Honor. And also——

The Court: To strike on line 2 over on page 2, line 10, the words "Scrap Metal Company of San Francisco?"

Mr. Lerer: And in place thereof, "plaintiff".

The Court: And insert in lieu thereof "plaintiff". The word "San Francisco", however, is on line 16.

Mr. Lerer: Yes, that would be deleted too, your Honor.

The Court: Yes.

Mr. Lerer: And then where it says, "employees of said Scrap and Metal Company were to"; that also is to be deleted.

The Court: All right, let's see. To be exact, that is, on line 16 of page 2, starting with the words, "the employees".

Mr. Lerer: Yes. [8]

The Court: And continuing on to line 17, the words, "of said Scrap Metal Company."

Mr. Lerer: Were to.

The Court: "Were to."

Mr. Lerer: That is to be deleted, and in place thereof,——

The Court: Insert——?

Mr. Lerer: ——the word "plaintiff".

The Court: "Whereby plaintiff——"

Mr. Lerer: "Could enter."

The Court: "Could enter." The words "plaintiff could" to be inserted in lieu thereof.

Mr. Lerer: And on line 18, to delete, "and beds".

The Court: Well, we have already done that.

Mr. Lerer: Oh, yes, that's right. I am sorry. And on line 19, to add, "and at all times herein mentioned plaintiff was an invitee of defendant."

The Court: All right.

Mr. Lerer: Paragraph 5, Your Honor, we will respectfully request that the entire paragraph be deleted, because it adds nothing, because the Scrap Metal Company of San Francisco are not involved.

The Court: Yes.

Mr. Lerer: And paragraph 8 of page 3, line 6, line 7, rather: "in the capacity of foreman of Scrap and Metal Company of San Francisco"—we ask that be deleted. [9]

The Court: Anything inserted in lieu thereof?

Mr. Lerer: "As an invitee was on the premises of said Marine Hospital."

The Court: "As an invitee"?

Mr. Lerer: Yes. And then on line 9, to exclude, "and beds" again.

The Court: All right.

Mr. Lerer: Paragraph 14, on page 4, we have the change, "the loss of earnings," because of that misunderstanding of the employment, your Honor, and on line 22 to delete "employed as the foreman of the Scrap and Metal Company of San Francisco and", to delete all that.

The Court: Yes.

Mr. Lerer: And show that he was just earning $400 a month. And then on line 25, instead of, "since that time", I would put "for one month." Then on line 27, where it says, "dollars wanted", to put a period there, and the remainder of line 27, 28, 29 and 30 to be deleted.

The Court: Starting with the words "per month" on line 27?

Mr. Lerer: Yes, your Honor.

The Court: To and including the word, "the time" at the end of line 30, to be deleted?

Mr. Lerer: Yes, your Honor.

The Court: Is that the extent of your motion?

Mr. Lerer: Yes, your Honor. [10]

The Court: Is there any objection?

Mr. O'Gara: We object to the amendment at this time on the ground it is untimely, Your Honor. There were depositions taken in this case, or a deposition of the plaintiff was taken by the defendant on March 14, 1950, and no filing was made subsequent. This is the first indication we have had of an amendment to the complaint in the respects that are offered. As I understand the amendments,

they are intended to make the complaint conform to what may be the proof.

The Court: Yes.

Mr. O'Gara: At the same time, the amendments present an entirely different theory to the legal status of this individual at the time that he was there.

The Court: That is a question I desire to ask you.

Mr. Lerer: Not at all. First of all, the deposition was taken, and counsel is not taken by surprise. If I at this time had presented by these amendments, your Honor, a new theory of law, why, counsel would be taken by surprise since he didn't——

The Court: Well, let me cut this a little short, because I think I see the problem here and I want to ask Mr. O'Gara this question. Wouldn't this plaintiff have been an invitee had he been an employee of the Scrap and Metal Company of San Francisco, which had authority to go there and be on the premises? Wouldn't he be a business invitee as an employee of that company? [11]

Mr. O'Gara: The theory of the government is that he would not be.

The Court: The theory of the government is that he is not an invitee now?

Mr. O'Gara: Or at any time.

The Court: Or at any time. However, referring specifically now to the amendment, the amendment does not change his position in law; it merely changes the factual situation as to whether he was

there as an invitee himself or as an invitee as an employee of the Scrap Metal Company.

Mr. O'Gara: Well, your Honor, the amendment changes his position to the extent that there is an attempt to make him a contractor with the government, and if he had been there as an employee of the Scrap Metal Company, which was for purposes of this argument, we may concede, a contracting party with the government, we have a different situation that if we at this time attempt to come within the terms, or if he attempts to come within the terms of the contract which the government had with the Scrap Metal Company, as though he were one of the contracting parties.

Mr. Lerer: No difference.

The Court: There is no difference in theory, no, Mr. Lerer. I understand.

Mr. Lerer: The deposition was taken, counsel knew exactly what it was several months ago. There is no obligation [12] upon the part of an individual to amend any period of time before. You can amend at the time of the trial. It is a perfunctory thing that is done every day.

Mr. O'Gara: Within the discretion of the court.

Mr. Lerer: That is true.

The Court: That is true.

Mr. Lerer: That is true.

The Court: And the only point that the Court is concerned with is whether or not it places the defendant in a position of being surprised with a new theory. Now you may have a different interpretation of the facts in the situation, but I don't

think any new theory has been here presented, and if a new theory had been presented or new facts had been developed and you desired additional time to prepare for the matter, then you could make a request for additional time.

Mr. Lerer: No objection at all, your Honor.

The Court: Secondly, might I not pose this question to you, Mr. O'Gara: If the facts develop under the pleadings here, wouldn't a motion in the nature of an amendment to have the pleadings conform to the proof be an order to do the very same thing he is trying to do now?

Mr. O'Gara: That is correct, your Honor; there isn't any doubt about that. We are ready to proceed.

The Court: Therefore I am going to grant the motion to amend, and if you desire additional time to prepare for this [13] matter, I will hear your request on that matter at this time.

Mr. O'Gara: No, your Honor, I think we may proceed.

The Court: All right, then the motion will be granted and the complaint is amended as has been indicated by the discussion here.

* * * * *

GERALD J. TRUBOW

called on his own behalf, sworn.

Direct Examination

Mr. Lerer: Q. Mr. Trubow, you are the plaintiff in this case, are you not? A. Yes, sir.

Q. And you reside in San Francisco?

(Testimony of Gerald J. Trubow.)

A. Yes, sir.

Q. Married and have a child?

A. Two children.

Q. Two children. Calling your attention to the 22nd day of April, 1949, did you have a business or occupation?

A. I was on commission with the Bercovich Scrap and Metal Company at that particular time. It was just previous to that that I went off salary, when the market took a drop, and I was [14] able to work with any individual that was coming into the yard, to go on outside calls. I had the authority of the company.

Q. But prior to that time you were employed as foreman of the yard of M. Bercovich and Company? A. That's right.

The Court: How do you spell that?

Mr. Lerer: B-e-r-c-o-v-i-c-h.

Q. Prior to that time you were a foreman and acting and receiving a salary?

A. That's right.

Q. As I understand, they have changed over to a commission? A. Right.

A. And on the 22nd day of April, 1949, you were still there at the yard doing substantially the same work, but on a commission? A. That's right.

Q. Is that correct? Now, did you have occasion, with a man by the name of Louis Steinberg to bid and have that bid accepted, of certain refrigerators at the Marine Hospital at 14th and Lake in San Francisco? A. Yes, I did.

(Testimony of Gerald J. Trubow.)

Q. Would you tell the circumstances surrounding the bid?

A. Well, Mr. Louis Steinberg was in business for himself, and when I went on commission, he came up to me and asked me [15] if I would go in together with him on the bid at the Marine Hospital. The reason the bid was put in under his name was that he was doing business as——

Mr. O'Gara: I object to any reason.

Mr. Lerer: All right. Very well.

Q. Well then, we will put it this way, that you had a bid for the purchase of certain refrigerators and that—the bid had been accepted, is that right?

A. That's right.

Q. How many refrigerators were there?

A. If I remember correctly, either two or three.

Q. Do you remember what you were to pay for these refrigerators? A. Offhand, no.

Q. Was the money paid?

A. Yes, it was paid up on deposit.

Q. At the time of the bid? A. Yes.

Mr. O'Gara: Your Honor, at this point I would ask that the bid itself, or a copy of the bid, be produced; that would be the best evidence.

The Witness: A copy of the bid is at the Marine Hospital in the hands of the purchasing department. They have a copy and Mr. Steinberg has a copy.

Mr. Lerer: Q. Do you know where the—strike that. [16] Do you know the whereabouts of Mr. Steinberg?

(Testimony of Gerald J. Trubow.)

A. I understand he is in Honolulu.

Q. You don't have access to the written bid itself? A. No, I don't.

Q. Did you or do you know of your own knowledge that the written bid was submitted and accepted by the Marine Hospital? A. Right.

Q. And in pursuance to that bid, you were told to come out and pick up the refrigerators?

A. I was given the slip that was sent to Mr. Steinberg, to go to the Marine Hospital and pick up the refrigerators.

Q. That slip is in whose possession now?

A. I think in the purchasing department of the Marine Hospital. I don't know if there was more than one.

Mr. Lerer: Counsel, would you have those slips with you at all?

Mr. O'Gara: I will see whether we have a copy. I have a photostatic copy of the bid and acceptance, which I think is the document that he refers to (producing).

Mr. Lerer: Q. I show you what purports to be an invitation bid and acceptance and ask you if you can identify that (handing to witness).

A. Yes, the refrigerators on the bottom.

Q. Well, does that look like the bid that was submitted under the name of Louis Steinberg, your partner in this deal, [17] for the purchase of these refrigerators? A. That's right.

Mr. Lerer: We will introduce as plaintiff's exhibit first in order, your Honor, this.

(Testimony of Gerald J. Trubow.)

The Court: It may be admitted into evidence as plaintiff's exhibit No. 1.

(Whereupon bid and acceptance for refrigerators, referred to above, was received in evidence and marked plaintiff's exhibit No. 1.)

Mr. O'Gara: Pardon me. May the clerk please staple the two pages of that plaintiff's exhibit No. 1 so that they may not become disconnected?

The Court: Are they both the same document?

Mr. O'Gara: Yes, they are. One is a continuation sheet, your Honor.

The Court: All right. Is there any objection to that?

Mr. Lerer: No, your Honor.

The Court: The two documents will be stapled together as plaintiff's exhibit No. 1.

Mr. Lerer: I presume there is no difference, although perhaps I had better——

The Court: Well, if they are both material to this matter, they can still be continued as one exhibit. I have no reason to want them to be identical. I just want to know that they are the same subject matter. [18]

Mr. Lerer: Yes.

The bid, as I understand on, on this exhibit No. 1, was for these refrigerators, electric, for 110 volt, 60 cycle, A.C. current; another one, one Grunow-Kelvinator model, household type, seven cubic foot capacity, serial No. SD-451375; and the third one, one Westinghouse household type, seven cubic foot

(Testimony of Gerald J. Trubow.)

capacity, serial No. 996016-5149384. Were those refrigerators those which were picked up on the 22nd of April, 1949? A. That's right.

Q. Yes. Now you say that you received a slip of some sort which you took to the Marine Hospital, is that correct?

A. Well, I don't recall whether it was a slip or whether it was a copy or what they sent out when the bid was awarded. You would have to take that up to the purchasing department so you could get authority to pick up the merchandise.

Q. From whom did you get that paper?

A. I received it from Mr. Steinberg.

Q. You don't know where that was sent in the mail—whether that was sent to him by mail from the Marine Hospital, or——

The Court: If I remember correctly, he received it by mail.

Mr. Lerer: Yes.

Q. Do you recall what that slip said, or the substance of it?

A. All I recall was to pick up the refrigerators. What the [19] wording of the subject was, I don't recall.

Q. In other words, it directed you pick up the refrigerators and identify them? A. That's right.

Q. Did you go to the Marine Hospital on the 22nd day of April, 1949? A. I did.

Q. About what hour of the day?

A. It was after lunch.

Q. Well, approximately; do you recall?

(Testimony of Gerald J. Trubow.)

A. I would say around one or one thirty.

Q. Did you go with somebody else?

A. Yes, I did.

Q. The name of the man? A. Louis Rossi.

Q. What capacity did he go in?

A. He is a driver for M. Bercovich and Company.

Q. He drove the truck?

A. That's right.

The Court: What is this man's name again?

The Witness: Louis Rossi.

The Court: R-o-s-s-i?

The Witness: R-o-s-s-i.

Mr. Lerer: Q. When you entered the premises, where did you go, Mr. Trubow? [20]

A. We went down in the basement, if I recall, to where the storeroom is, first. When we drove the truck around the side of the hospital.

Q. Then what did you do?

A. I went inside with the driver and we asked the fellow in attendance there where we picked up the refrigerators and he asked if we had a copy of the paper I had in my hand, and I showed it to him. He took me upstairs to Mr. Lewis, who is the purchasing—in the purchasing department at the Marine Hospital.

Q. Where was that? Was that in the offices at the Marine——

A. In the offices. I think it was either on the first or second floor.

Q. Did you have a conversation with Mr. Lewis?

(Testimony of Gerald J. Trubow.)

A. Yes, I did.

Q. Do you know what capacity Mr. Lewis occupies at the Marine Hospital?

A. I understand he is the head of the purchasing department.

Q. Yes. Now what was the conversation that you had with him?

A. I showed him the copy of the bid that I had in my hand. He looked it over, got the copies that he had, and then we were talking about other bids that might come up, and then he said that we could go downstairs and pick the refrigerators up, and I think he signed the bid that I handed him; of that [21] I am not sure.

Q. Then what did you proceed to do?

A. I went back downstairs and the man that was starting to load the refrigerators up the stairs—he was told that there was a freight elevator over in the corridor that we could use.

Mr. O'Gara: I object to "he was told".

Mr. Lerer: Well——

Mr. O'Gara: And I ask it go out.

The Court: That part may go out.

Mr. Lerer: Yes, that part might go out, your Honor.

Q. You then went downstairs, is that correct?

A. That's right.

Q. Did you have occasion to—withdraw that. You were directed downstairs by Mr. Lewis?

A. That's right.

Q. While you were going downstairs, did you

(Testimony of Gerald J. Trubow.)

have occasion to meet somebody before you go to the freight elevator? A. Yes.

Q. Who did you meet?

A. The party that was in charge down in the storeroom.

Q. When you say in charge, you mean the man employed by the United States Government at the Marine Hospital? A. That's right.

Q. Did you have a conversation with him? [22]

A. I don't recall if I had the conversation with him, but the topic of conversation at the time was that there was an elevator that we could use, so we wouldn't have to take them upstairs, up the stairs.

Mr. O'Gara: I will object to that, your Honor. He said he didn't recall, and yet he went on to say that there was a—related the topic of conversation.

Mr. Lerer: Yes, I think that is a valid objection, your Honor.

The Court: Well, the objection will be sustained as to the form. The only thing I see is, were you present while the conversation was had with somebody else?

The Witness: Yes, sir.

The Court: You heard it yourself?

The Witness: Yes.

The Court: All right, then you may proceed to question him.

Mr. Lerer: Q. Did you hear the conversation directly with their employee, or was the employee of the government talking to Mr. Rossi, do you recall?

(Testimony of Gerald J. Trubow.)

A. I would say he was talking to both of us.

Q. All right. What did the employee say? What did Mr. Rossi say and what did you say?

A. Mr. Rossi asked where the elevator was, and he told him it was around the corridor on the far end. [23]

Q. By "he" you mean whom?

A. The party that we were talking to, from the Marine Hospital.

Q. Yes. Now what did you say?

A. I said to my driver there, I says, "Well, they have an elevator. It is easier to take it than trying to get it up stairs."

Q. Yes. So the government employee directed you toward this elevator? A. That's right.

Q. Did he at that time tell you the type of elevator it was? A. No, sir.

Q. Was there anything said about the operation or control of this elevator? A. No, sir.

Q. Did Mr. Lewis, before you came down, inform you of the elevator, what type of elevator it was? A. No, he did not.

Q. Or the method of operation or control of the elevator? A. No.

Q. Then what did you do, if anything, after you had this conversation with this employee?

A. Mr. Rossi—I walked with Mr. Rossi, as he had the refrigerator on the handtruck, and he went into the elevator [24] and asked me to close the door, as he could not use the elevator, because he was holding the handtruck with the refrigerator.

(Testimony of Gerald J. Trubow.)

Q. Yes. Do you know how big this elevator was?

A. I would say it was a little larger than the average elevator that we handle freight on.

Q. You don't know the dimensions, or——

A. Not offhand, no.

Q. I see.

The Court: Have those photographs been identified?

Mr. Lerer: Not yet, your Honor.

The Court: Would you have them marked for identification so we will know about them, know what we are talking about, in the order in which you desire to have them marked?

Mr. Lerer: Yes, your Honor. We will introduce these photographs for the purpose of identification.

The Court: Just in the order, and the clerk will just mark them for identification. Then you can question the witness about them.

Mr. Lerer: All right.

The Court: We will identify them later as to what they show.

Mr. Lerer: Very well. Ask they be marked as plaintiff's 2, 3 and 4, your Honor.

The Court: Very well. [25]

The Clerk: Exhibits 2, 3 and 4 for identification only.

(Whereupon photographs referred to were marked plaintiff's exhibits 2, 3 and 4 for identification.)

Mr. Lerer: I think I have turned these around

(Testimony of Gerald J. Trubow.)

a bit, your Honor. But we can identify them by number.

Mr. Lerer: Q. I show you plaintiff's 4 for identification, which purports to be a picture of an elevator, and ask you if you can identify that (handing to witness).

A. Yes, that is the elevator we went into.

Q. Is that a picture of the elevator in which you received certain injuries which we will go into later? A. Yes.

Q. Were you present at the time this photograph, identified as plaintiff's 4 for identification, was taken? A. Yes, sir.

Q. You were there at the time?

A. Yes, sir.

Mr. Lerer: We will introduce this as plaintiff's exhibit next in order, your Honor.

Mr. O'Gara: That will be plaintiff's——?

The Court: It may be introduced as plaintiff's exhibit 4. We will just keep them with the same number.

Mr. O'Gara: That is of the elevator——

The Court: We will digress from chronological numbering of the exhibits, because I know that the photographs will come [26] in later, anyway.

Mr. O'Gara: We have no objection to the introduction of that exhibit 4.

The Court: 4 for identification will be admitted.

(Whereupon plaintiff's exhibit No. 4 for identification was received in evidence.)

Mr. Lerer: Q. I show you a photograph which

(Testimony of Gerald J. Trubow.)

purports to be a picture of the elevator——

Mr. O'Gara: That is identified as what, counsel?

Mr. Lerer: Identified as plaintiff's 2.

Q. (Continuing)—and ask you if you can identify that particular photograph?

A. Yes, I can.

Q. Is that a picture of the elevator which you were present in on April 22, 1949, at which time you received certain injuries? A. Yes, sir.

Q. Were you present at the time that those photographs were taken? A. Yes, I was.

Mr. Lerer: Introduce this as plaintiff's No. 2, your Honor.

Mr. O'Gara: Well, we will object to this, your Honor. While there is some showing from the picture itself that there is an elevator represented on the picture, it is a picture of [27] the doors, the outside doors of the elevator or shaft, and not a picture of any door on the elevator or any part except a small portion between the two doors of the elevator. There has been no testimony as to what doors, and there are, as I understand it, more than one set.

The Court: Yes, I will overrule the objection at this time, and if the photographs aren't connected up, you can move to strike the photograph, plaintiff's exhibit 2 for identification, will be admitted into evidence as plaintiff's exhibit 2.

(Whereupon plaintiff's exhibit No. 2 for identification was received in evidence.)

(Testimony of Gerald J. Trubow.)

Mr. Lerer: Q. I show you a photograph which purports to be of the doors of an elevator and ask you if you can identify that photograph.

A. Yes, these are the doors of the elevator that we loaded the refrigerators on.

Q. Were you present at the time that this photograph was taken? I am referring to plaintiff's exhibit 3. A. Yes, I was.

Mr. Lerer: We introduce this as plaintiff's exhibit No. 3, your Honor.

Mr. O'Gara: May the record show the same objection; no proper foundation?

The Court: Yes, the record will show it and the same [28] ruling will be made, and the photograph will be admitted into evidence as plaintiff's exhibit No. 3.

(Whereupon plaintiff's exhibit No. 3 for identification was received in evidence.)

Mr. Lerer: Q. Mr. Trubow, after having this conversation with this government employee, what did you then do, if anything?

A. You mean before we went to the elevator or after?

Q. Before you went to the elevator. I had you where you and Mr. Rossi were talking to this government employee in the basement. A. Yes.

Q. Then he referred to this elevator, and what did you do after that?

A. Well, I went upstairs to clear the papers, to pick up the refrigerators, and then when I came

(Testimony of Gerald J. Trubow.)

back downstairs they were already over by the elevator.

Q. By "they" you mean whom?

A. Mr. Rossi and this government man that took him over there.

Q. Did you walk over to the elevator?

A. I was by the elevator, and then when it was loaded, I walked on.

Q. When you came to the elevator, what was the position of the doors?

A. They were—the elevator was wide open. [29]

Q. I show you plaintiff's 4 and ask if these were the positions, or rather, if that was the position of the door at the time that you first stepped on the elevator. A. No, it was not.

Q. Well, what was the position of the door?

A. The position of the door of the elevator was open. In other words, there was no doors or anything showing on the elevator when I walked on.

Q. Well, if this grilled door was lifted, would it then show the position of the doors at the first time that you entered upon the elevator? A. Yes.

The Court: May I see that photograph? (Examining.)

Mr. Lerer: Q. So then as I take it, the bottom door was flush open, flush up to the top, and the lower door was flush down to the bottom?

A. That's right.

Q. When I say that, did you know at that time that the door was divided in half, that there was a bottom and an upper part?

(Testimony of Gerald J. Trubow.)

A. No, I did not.

Q. But as you walked on, you say that there was no part of any door showing?

A. That's right.

Q. With the exception, as I take it, from this photograph, of this handle on the very top? [30]

A. That's right.

Q. You stepped into the elevator and what happened, if anything, after that?

A. Mr. Rossi asked me to close the elevator door as he could not reach it on account of holding the handtruck with the refrigerator. Which I proceeded to do.

Q. How did you do that?

A. I looked up, put my hand up on the handle and came right straight down.

Q. Now I show you plaintiff's 3, and I ask you if that properly identifies the way that you reached out and grabbed the handle?

A. That is the way I grabbed the handle, except it was higher up at the time.

Q. Well, how high up was it at the time that you reached?

A. It was right up to the top.

Q. Yes.

The Court: May I see the photograph?

Mr. Lerer: Yes, your Honor (handing to Court).

Q. As you pulled the handle down, what occurred, if anything?

A. The next thing, my hand was caught in between the two doors.

(Testimony of Gerald J. Trubow.)

Q. Did you see the lower door coming up?

A. No, I did not.

Q. How much of an effort did you expend in pulling the upper [31] door down?

A. I came down with my full force.

Q. Did you notice the construction of this door?

A. No, I did not.

Q. But you believed it was necessary——

A. To pull down like the average elevator.

Q. Now previous to you putting your hand out to grab the handle and pull it down, did you see any other way of pulling that door down?

A. No, sir.

Q. Did you, subsequent to your injury, find out that there was another way of pulling the door open? A. You mean that elevator door?

Q. Yes. A. No, sir.

Q. Now after you came back to take those pictures, did you have occasion to look on the inside of the door?

A. I didn't, but the man that took the picture was looking around and he spotted this little piece of leather strap that—it was broken off on the inside. That was the first time I saw anything else.

Q. That is the first time you had occasion to see anything on the inside concerning a strap?

A. That's right.

Q. How long was that strap? [32]

A. Roughly around a half inch. It was riveted or bolted to the metal part of the door.

Q. Was there any sort of metal of any kind that

(Testimony of Gerald J. Trubow.)

surrounded the strap? A. I would say no.

Q. There was just a little piece of dark strap, would you say? A. That's right.

Q. Just a half inch protruding, or a half inch down? A. Roughly.

Q. Do you recall how far from the lower part of the elevator that strap was?

A. I would say roughly two or three inches above where the part of the handle was, or in the inner part of the door.

Q. More specifically, referring to plaintiff's 2, would you say where this——?

A. No, I would say in the center of the door, up in this portion, on the inside (indicating).

Q. Yes, the center part up there?

A. Yes.

Mr. Lerer: The center part up there (indicating), a half inch, your Honor. (Handing to Court.)

The Court: The witness is referring to the——

Mr. Lerer: The lower part of the center part of the upper door. [33]

Mr. O'Gara: In what exhibit, your Honor.

The Court: In plaintiff's exhibit 2.

Mr. O'Gara: As I understand the testimony of this witness, he refers, however, to the inside.

The Court: Yes, the inside. It would be the inside of the elevator.

The Witness: If I remember correctly, yes, your Honor.

Mr. Lerer: Q. You saw nothing on the outside

(Testimony of Gerald J. Trubow.)

of the elevator that showed there was a rope or had been a rope, to the best of your knowledge?

A. No, sir.

Q. Now on plaintiff's 4 there is a grilled door. Now that had nothing to do with the accident, is that correct? A. No, sir.

Q. Just for the purpose of clarification, when you refer to a door, you mean this particular door referred to in plaintiff's 2, in which you have your hand on the handle, is that correct?

A. Yes, sir.

Q. Now what was the condition of the lighting on the inside of the elevator at the time that the accident occurred?

A. If I recall, there was no light in the elevator. The only lighting was a light in the corridor of the hospital, where the elevator is, and where that light was, I do not know. [34]

Q. You don't know how far away from the elevator the light was in the corridor?

A. Exactly, no, sir.

Q. But there was no light in the elevator at all?

A. I don't recall there was any light.

Q. And what would you say as to the general lightness or darkness of the condition inside the elevator?

A. Oh, there was enough reflection from the light of the corridor to see what you were doing in the elevator.

Q. What do you mean, see what you were doing?

A. Well, you were able to walk in without being in a total darkness, or to bump into anything.

(Testimony of Gerald J. Trubow.)

There was enough light to see where you had to go.

Q. Yes, but was there—was that all the light that was there at that time? A. That's right.

Q. I take it you couldn't have read a newspaper in there? A. I don't think so.

Q. What happened after you pulled the handle down, Mr. Trubow?

A. I let out a yell. It happened so fast. Then I started up to the purchasing department to find out if I could go to a doctor.

Q. Well, let's—before you get there——

A. I pulled down, and the next thing I knew, my hand was [35] caught between the two doors.

Q. Then you went upstairs?

A. Then I started upstairs, and on my way up, Mr. Lewis was walking down and I stopped him on the stairs and told him what happened and asked him if he would take me over to the doctor, which he proceeded to do. And I went to the doctor and he looked at my hand, and it was swelling up, and he told me he thought I had a bad bruise and I should go home and soak it in epsom salts. Then I left and that was all. I got back in the truck with the driver and we were on our way back to the yard. [36]

* * * * *

Cross Examination

By Mr. O'Gara:

Q. Let's go back and go over this in an orderly way. You went to Mr. Lewis, the supply officer. Mr. Lewis told you nothing about the elevator?

A. That's right.

(Testimony of Gerald J. Trubow.)

Q. Then you went downstairs to the storekeeper from Mr. Lewis' office?

A. I went back downstairs, yes, sir.

Q. Now the first person connected with the Marine Hospital you saw on the day you went out for these refrigerators was the man who sent you to Mr. Lewis? [64] A. The first person, yes.

Q. That man said nothing to you about the elevator, is that right?

A. That I do not recall, whether it was that man or someone else.

Q. Now at that time, the time that this man sent you to Mr. Lewis, did that man say anything to you about the elevator?

A. I don't think so. I don't recall.

Q. Well, isn't it correct that he sent you to Mr. Lewis with your slip of paper?

A. Yes, that's right.

Q. All right. After you went and saw Mr. Lewis, you then went downstairs again to the storekeeper again, is that correct?

A. I went down to where I originally was, that's correct.

Q. That was near the entrance to which you came with the truck? A. That's right.

Q. Do you know whether that was the north, south, east or west side of the hospital?

A. No, I do not. All I know, it was on the side of the hospital.

Q. All right. Now when you came down near the entrance to which you had brought the truck, at

(Testimony of Gerald J. Trubow.)

that point did you see anyone connected with the hospital or anyone who in your [65] opinion was connected with the Marine Hospital?

A. Whoever directed us to where the refrigerators were.

Q. All right. Now when and where did you first hear about the elevator?

A. When he started to load up.

Q. Wait. When you say "he"——

A. When Mr. Rossi started to load it upstairs.

Q. Was that after you had seen Mr. Lewis?

A. When I went upstairs to see Mr. Lewis, he proceeded to get the refrigerators. He was told by this party where they were.

Q. But at that point he was not told anything about the elevator or in your presence——

A. Not right at that point.

Q. All right. A. Not that I know of.

Q. All right. Then you came down from Mr. Lewis' office and you saw someone in the storekeeper's room?

A. Well, he wasn't in the storekeeper's room. He was in the corridor talking to us, in the hallway.

Q. But between the entrance where you had your truck and where the storekeeper's office was, is that correct? A. That's right.

Q. At that time was said, what exactly was the conversation?

A. He told us that we didn't have to——

Q. Wait. "He" told who? [66]

A. Mr. Rossi and myself.

(Testimony of Gerald J. Trubow.)

Q. Well, you were both there?

A. I was standing there then. That is when I came back from Mr. Lewis' office.

Q. All right.

A. And he told him that he did not have to take them upstairs.

Q. Which stairways did he refer to?

A. The stairs that come right in off the side of the hospital. There is either three or four stairs with the rail on the side.

Q. And that was on the side away from the elevator side? A. Yes.

Q. The south side of the hospital?

A. Well, I don't recall what side of the hospital.

Q. But it was on the storeroom side, the storekeeper's office?

A. I would say it was the storekeeper's side, yes.

Q. Well, if we said that that was on the south side, or the elevator was on the north side, that would put it on the south side?

A. All I know is, it is the stairs you have to take to go down into the corridor from this side of the hospital. Now if it was the south or the north, I could not recall.

Q. That stairway came out nearest to the storekeeper's office?

A. If that is what they call the storekeeper's office, sir, [67] I would say yes.

Q. If at that time Mr. Rossi was present with you—at that time this individual told you what?

(Testimony of Gerald J. Trubow.)

A. That we did not have to take them upstairs, that there was a freight elevator.

Q. Tell us exactly what his language was. What did he say?

A. I am repeating what I recall that he said, that we did not have to take them up the stairs, that there was a freight elevator.

Q. Did he say anything else?

A. I do not recall.

Q. Did you ask him to use the elevator?

A. No, he told us we could. We did not ask.

Q. Did he say that you were to use the elevator or that you could use the elevator?

A. He said that we could use the elevator and would not have to pull them up the stairs.

Q. Now you say you went back to the hospital the day after the accident to take pictures?

A. No, I did not say that. I am sorry.

Q. When did you go back to the hospital with the man who took the pictures?

A. I misunderstood you. I thought you meant X-rays. I went back the following day to take pictures of the elevator, that's correct. [68]

Q. Who is the person you went with to take the pictures? A. Mr. Jess Lieberman.

Q. Where does Mr.—is that L-i-e-b-e-r-m-a-n?

A. Yes.

Q. Where does he have his studio?

A. He has no studio.

Q. Where does he have——

A. He lives on 38th Avenue.

(Testimony of Gerald J. Trubow.)

Q. Is he a professional photographer?

A. No, he is not.

Q. A friend of yours? A. Yes, he is.

Q. This was the day after the alleged injury took place?

A. If I recall correctly, the day after or maybe the following day. No, I wouldn't say if it was one or two days.

Q. Within the same week? A. That's right.

Q. All right. At the time that Mr. Lieberman was there, did Mr. Lieberman take any pictures besides the pictures that have been shown here in court?

A. All he took was those pictures of the elevator, with Mr. Lewis present.

Q. Didn't Mr. Lieberman take a picture of the inside of the door?

A. The pictures he took are the pictures you have as an exhibit. [69]

Q. Well, Mr. Lieberman, according to your testimony, indicated something about the inside of the elevator.

A. I said when he looked around, when he looked in there, was when he noticed that strap was not in the door. It was broken off.

Q. You say he noticed. Did he tell you that or did he show you that?

A. We both looked at it.

Q. And you saw it?

A. That's right. It was pointed out to me.

Q. There was no picture taken of it?

(Testimony of Gerald J. Trubow.)

A. You couldn't take a picture of that inside; rather, we didn't bother to take an inside view of the back end of the elevator. We just the view of the elevator doors.

Q. Well, at any time, isn't it a fact, Mr. Trubow, that these pictures, 2, 3 and 4, were taken with lighting equipment brought by Mr. Lieberman?

A. I don't know if he had lighting equipment or not, to tell you the truth. I don't know what kind of a camera he uses.

Q. Don't you recall a flashbulb exposure?

A. Well, the flash on his camera.

Q. Yes?

A. I think so, if I recall correctly.

Q. In what condition, what did the physical condition of the elevator constitute which prevented you from taking the picture [70] of the inside of the door of the elevator?

A. Because I had never asked him to take one of the inside.

Q. But you have stated that you saw on the inside of the door what appeared to be a broken strap? A. That's right.

Q. And no picture was taken of that?

A. I don't recall. No, sir.

Q. There is no picture here.

A. There wasn't any taken.

Q. It is your testimony that these are all the pictures that were taken? A. That's right.

Q. Going back to your conversation with the individual who said that you could use the elevator,

(Testimony of Gerald J. Trubow.)

it wasn't necessary to use the stairs; at that time did you know where the elevator was located?

A. No, I did not.

Q. Who showed you where the elevator was located?

A. The party, whoever he was, that took us over to the elevator.

Q. You came back, according to your testimony, within one or two days to take these pictures?

A. That's right.

Q. Now at that time did you go to the office of the storekeeper? [71]

A. No, I did not. I wasn't—I went to the office of Mr. Lewis and asked if I could have permission to go downstairs and take pictures.

Q. At that time did you go into the basement to take the pictures?

A. We went to the elevator, yes.

Q. Did you ride in the elevator?

A. No, we did not.

Q. Do you recall whether or not these pictures, Exhibits 2 and 3, represent the basement floor, the first floor or the second floor?

A. That represents the basement floor.

Q. Both these pictures? A. Yes.

Q. You are positive of that?

A. Definitely.

Q. Recalling the time that you took the pictures, did you not go to the office of the storekeeper to locate the individual who had told you to use—told you that you might use or could use the elevator?

(Testimony of Gerald J. Trubow.)

A. Would you repeat your question, please?

Q. At the time that you took these pictures, did you not go to the storekeeper's office?

A. I don't think I did.

Q. Did you make any endeavor subsequent to the time of the [72] injury which is alleged to have occurred in the elevator? Or did you make any effort to locate the individual who you say said you could use the elevator? A. No, I did not.

Q. Could you identify that individual?

A. No, I could not.

Q. Does the man sitting there in the first row (indicating)——

A. I couldn't tell you that. It has been over a year since the accident happened.

Q. Have you ever seen that man before?

A. No, I haven't. As far as a personal individual is concerned.

Q. In connection with the elevator or the use of it, you say that there was no light in the elevator. Showing you Exhibit 4; that is a picture taken from the floor side of the elevator, is that correct?

A. That's right.

Q. And on the base——

The Court: You mean by that, the outside?

Mr. O'Gara: The outside looking into the car.

The Witness: That's right.

Mr. O'Gara: Q. You will observe the ceiling of the car? A. Yes.

Q. Do you recall having observed in the photo-

(Testimony of Gerald J. Trubow.)

graph what the ceiling of the elevator or car was, what it consisted of, how [73] it was made?

A. No, I did not.

Q. Well, isn't it a fact, Mr. Trubow, that the ceiling of the car was just as the mesh gate, a wire caning construction?

A. I could not tell you.

Q. Isn't it a further fact, Mr. Trubow, that the ceiling of this elevator car admitted north light from the windows and the door of the floor above, so that the shaft of the elevator, the elevator shaft and the elevator car, were indeed light, but without artificial illumination?

A. That I do not recall, but from my past experience, going into elevators, when you go from one floor to another, you have a blank wall on the back end.

Q. Well, isn't it a fact that when you took these refrigerators out of the car, you took them out at the entrance which is the driveway behind the hospital on the north side and that in that——

A. That was on a different floor, they were taken out.

Q. The floor above the basement?

A. If that was the floor; wherever the loading platform was.

Q. The loading platform is on the north side of the hospital, that is, when you entered, looking at picture 4, when you entered with the refrigerators from the outside as shown in this picture; the refrigerators were wheeled through the cars?

(Testimony of Gerald J. Trubow.)

A. Right; straight. [74]

Q. Right straight through? A. Yes, sir.

Q. They were wheeled through on the next floor above?

A. Going right straight out the same way.

Q. Yes? A. That's right.

Q. And when they were wheeled through, they were wheeled through doors that opened up like garage doors? They were unlike this door, they were not like this door showing in the picture?

A. I wasn't there when the refrigerators were moved. I was on my way to the doctor.

Q. Well, it was your testimony this morning that you had no difficulty seeing the inside of the car.

A. That was when it was down in the basement.

Q. You could see everything in the car itself?

A. I said the car wasn't dark, where you couldn't see where you were going.

Q. And you don't recall whether or not the reason was because the illumination provided by those north windows above shed light down the shaft?

A. No.

Q. When you turned around to operate this door, Mr. Trubow, isn't it a fact that you had to put your hand out and underneath the top door to grab the handle which is on the outside [75] of the door? Isn't that correct?

A. Yes, I put my hand in an upright position (indicating).

Q. And that was almost your full height?

(Testimony of Gerald J. Trubow.)

A. My full height, that's right.

Q. But it was underneath the door?

A. Well, as the picture shows, the handle is coming down and I put my hand on the handle.

The Court: I think you are both referring to the same thing, but in a little different language. As I take it, the handle is on the outside of the door and you have to reach on the outside?

The Witness: It comes right down and I just reached over and got a hold of the handle and reached and pulled straight down.

The Court: The witness is indicating by putting his right hand up and palm down.

Mr. O'Gara: Q. You were standing there, and your palm, Mr. Trubow, had been turned towards you? A. Not necessarily.

Q. Well, look at the handle as exhibited in the picture Exhibit No. 4 and see if that doesn't indicate that.

A. If you will look at Exhibit 2, you can see also, your hand can be put the opposite way.

Q. Well, that, of course, is when the door is down?

A. That is when the door also is raised, straight up. I [76] mean, the handle is hanging from the door.

Q. At any rate, you had to put your hand underneath this edge of the door?

A. I would say not, because the handle was hanging far enough down that where the door was flush, that the handle wasn't.

(Testimony of Gerald J. Trubow.)

The Court: Well, your hand was still underneath the door?

A. Well, it was on the handle which was protruding down from the door. My hand wasn't underneath any slot of the door, if that is what the counsellor means.

The Court: No, but let's put it this way. You had to pass your hand underneath that door to get it on to the handle, isn't that correct?

The Witness: Well, maybe I'm a little bit—. But I would say when the handle was coming down, when there is a leeway where you come to.

The Court: I understand that.

The Witness: Your hand is not underneath the slot of the door.

The Court: The angle is different when you are reaching high.

The Witness: I just reached straight up, got hold of the handle and come right straight down (indicating). I didn't have to reach into any slot. The handle was protruding enough for my hand to reach it.

Mr. O'Gara: Showing you plaintiff's exhibit No. 2, you [77] see what appears to be a hand, and then that handle? A. That's right.

Q. Is that your hand?

A. That's right, it is.

Q. It appears to be bandaged, is that correct?

A. Yes, it is. That was the following morning, if I—I presume, after I got hurt, or the next day, one of the two.

(Testimony of Gerald J. Trubow.)

Q. And this exhibit No. 2; is it your testimony that that represents the manner in which you operated that? A. That's right.

Q. With your hand underneath this bottom edge of the door?

A. Well, that was holding the door as we came down halfway to take a picture, showing how the doors came down. My hand was holding the handle when I pulled the elevator. But that was just to show the doors coming, one up and one down.

The Court: Well now, when your hand was struck, as you have testified, didn't you have your hand underneath this edge?

The Witness: That I do not recall. It happened so fast I couldn't tell you which way my hand was.

Mr. O'Gara: Q. And where was your hand with relation to the handle?

A. My hand was in the handle.

Q. Struck in the handle, is that correct?

A. Yes. As I came down, the door met right across my fingers.

Q. All right. Now when you entered this elevator, were the [78] refrigerators already loaded in?

A. This one refrigerator that he had on the hand truck was.

Q. When you entered the elevator, did you observe the open elevator at the top and bottom?

A. No, when I entered the elevator it was just an open hole. In other words, there was just an opening for me to walk in.

Q. When you entered the elevator, when you

(Testimony of Gerald J. Trubow.)

were once in the elevator, did you turn around and look at the top and the bottom?

A. I did not look at the top and bottom. Mr. Rossi asked me to close the door as I entered. I turned around, put my hand up and came down with the door.

Q. What did Mr. Rossi say to you about the door?

A. He never said anything to me about the door.

Q. Do you know who opened the doors before the refrigerators were put in?

A. That I do not know.

Q. Did you ask Mr. Rossi who opened the doors?

A. No, I did not.

Q. Did you ask Mr. Rossi if he had ever operated that elevator before?

A. Mr. Rossi was never out there to operate that elevator before.

Q. Did you ask him? A. No, I did not.

Q. Did you ask anybody in the hospital about the operation of the elevator?

A. No, we were told that we could use the freight elevator.

Q. Well, you were told, as you have testified——

A. That's right.

Q. ——that you might? A. Yes.

Q. But you were not told, if I understand you correctly, that this elevator should be operated one way or another?

A. Well, most elevators I have been into will

(Testimony of Gerald J. Trubow.)

have a sign saying, if they don't want anyone to operate it, that you do not operate this elevator without the party on duty. But there was no signs or anything that we noticed to tell us that.

Q. But did you determine from Mr. Rossi or from anyone anything at all about the operation of this elevator before you operated it?

A. No, I did not.

Q. Have you ever seen that kind of elevator before? A. No, I haven't.

Q. Had you ever been in a building where there were doors meeting in the middle?

A. I might have been in the building, but I was never in an elevator of that type.

Q. Well, your business, in the business that you are engaged in as a scrap metal dealer and on commission, didn't you pick [80] up scrap metal in industrial plants? A. Yes.

Q. Didn't you use freight elevators?

A. Yes.

Q. What kind of elevators did you use?

A. Well, the average elevator was a street elevator.

Q. Well, the average freight elevator; what kind of freight elevators?

A. I explained that the average freight elevator we used in most of the cases are what they call street elevators.

The Court: That is the kind that comes up to the sidewalk?

The Witness: That's right.

(Testimony of Gerald J. Trubow.)

Mr. O'Gara: What about the average freight elevator that was on the inside, an inside elevator, not a street elevator? What about the average one you used in that connection?

A. Well, the inside elevators usually are operated by someone in the building, and if we have to pick merchandise up in the building, we are taken down in the elevator by an elevator operator.

Q. So when you came to this elevator, you had never before, according to your testimony, used this kind of elevator before, is that right?

A. That's right.

Q. Nevertheless, you put your hand through and under the door? [81]

A. I put my hand in the handle, not under the door.

Q. Did you look for a handle on the inside?

A. When I looked up to close the door, the only thing that came to my eye was this brass handle that shows in the picture.

Q. Well, where were you standing when you——

A. Right in the center of the elevator.

Q. Were you standing in the center of the car floor, or were you standing in the space just between the car doors?

A. I was standing in the elevator right in the center, my back was to the——

The Court: You mean in the center of the doorway?

The Witness: That's right. In other words, walking in the elevator, I was standing right in it, right

(Testimony of Gerald J. Trubow.)

in the center and the handle was right about my hand.

The Court: You don't mean you were standing in the center then?

The Witness: On the elevator. In other words, when I walked in, the refrigerators was already in with the driver, and I walked in and he asked me to close the door. I turned around,——

The Court: The refrigerator took up most of the elevator space, didn't it?

The Witness: There was room on both sides, and there was also room for a party to stand in front. That is where I was standing. But—— [82]

The Court: But when you say the center, you mean equi-distant from the sides of the door, not from the front of the elevator to the back?

A. No. The center from the sides of the door of the elevator.

Mr. O'Gara: May this be marked for identification?

The Court: It may be marked, Mr. Clerk, as defendant's exhibit A.

(Whereupon photograph referred to above was marked defendant's exhibit A for identification.)

Mr. O'Gara: Q. Now when you looked up to get the handle, did you observe the door?

A. No, I did not.

Q. You didn't look at the handle, you didn't look at the door to which the handle was attached?

(Testimony of Gerald J. Trubow.)

A. No, all I did was looked up, saw the handle, put my hand on it and came down. That is from experience of pulling a door down in an elevator. You just take whatever there is to grab and you come down with it. If there is a strap, normally you take the strap. If there is a handle, you take the handle.

Q. But according to your testimony, you had never been in this kind of elevator before?

A. But most of them, there are a lot of elevators that have above-doors that are not this type of a door. It is just a plain wooden door that comes down.

Q. But this was not a plain wooden door. You saw that. [83] A. I did not see anything.

Q. Well, did you not see, showing you plaintiff's exhibit No. 2, that there was a metal edge on the bottom part?

A. I did not look. All I did was to close the door when he asked me. That was when I first walked into the elevator.

Q. And you pulled that door down; did you notice then the way the door——

A. That, yes. That's why I came down with my full force. I closed, I came down before I knew anything about my hand being in there.

Q. Now showing you government's exhibit A for identification, will you please examine it?

A. I would say——

Q. Have you examined it?

A. I am looking at it, yes.

(Testimony of Gerald J. Trubow.)

Q. On the basis of that examination, have you any refreshed recollection of what you saw when you looked for the handle of the door?

Mr. Lerer: Let's get that into evidence, counsel, if you want, before you examine him on it. If that is the inside of the elevator, will you introduce it in evidence and then——

Mr. O'Gara: Yes. If there is no objection by counsel.

Mr. Lerer: Well, would you ask him if that does look like the inside? I don't know.

The Witness: You mean the opposite side of the elevator? [84]

Mr. O'Gara: The inside of the car looking out.

A. I couldn't say, because when I came on the elevator, the man with the refrigerator was already, the driver already had the refrigerator on the hand-truck and I did not see the inside of the elevator.

The Court: You saw it next day when you took the photograph, didn't you?

The Witness: Yes, but I didn't look in the back end at all. I just went there to take pictures of the door, how my hand got caught.

Mr. O'Gara: Q. When you went with Mr. Lieberman to take pictures, is it not true that you observed the back side of the door?

A. Now which do you call the backside, the side door going out as we were unloading, or the back of the door?

Q. When you were on the inside of the car looking toward the hospital? A. Yes?

(Testimony of Gerald J. Trubow.)

Q. Did you not look at the back of the door, the door which you grabbed?

A. Yes, I did. I did look at that. He looked at it, and he pointed out to me about the strap. That is the first time I saw the doors of the elevator.

Mr. Lerer: Just to save time, if you tell me you know of your own knowledge this is the inside,——

Mr. O'Gara: Yes, it is.

Mr. Lerer: I am willing to stipulate it is so, to save the photographer having to be brought in.

The Court: It may be admitted into evidence as government's exhibit A.

(Whereupon government's exhibit A for identification was received in evidence.)

Mr. O'Gara: Q. Looking at government's exhibit A, will you tell us now whether or not recall what you saw when you reached for the handle?

A. All I recall of seeing was the handle that I grabbed with my hand. That is all.

Q. Looking at government's exhibit A, do you now see a leather strap in the middle of the upper door?

A. That leather strap was not on the side that I was when I pulled down the door, after the door came down.

Mr. Lerer: Is there a leather strap there? I didn't see it.

The Witness: This is on that side of the back end (indicating).

Mr. Lerer: Where is the leather strap?

(Testimony of Gerald J. Trubow.)

The Witness: If that is what they call a leather strap.

Mr. Lerer: Well now, I thought it was part of a mechanism. Now let's—. I am taking your word for this counsel, and perhaps we had better find out first when that picture was [86] taken. Perhaps the strap was put on after the accident occurred as a precautionary method or measure.

Mr. O'Gara: Well, we will have competent witnesses who will establish the taking of this photograph.

Mr. Lerer: Well, maybe we had better wait, then, your Honor. I thought that was part of the mechanism.

Mr. O'Gara: We are indefinite. It doesn't matter. It may remain marked for identification until further identification.

The Court: All right.

Mr. Lerer: I didn't know it was his contention there was a strap in the door or not. Is that your contention? May——

The Court: Well, it may remain marked for identification, and he may question the witness about it. It will not be admitted into evidence before a further foundation has been laid.

(Whereupon defendant's exhibit A was withdrawn, being no longer in evidence, and was marked exhibit A for identification only.)

Mr. O'Gara: Q. Showing you government's exhibit for identification A, can you tell us whether or not you saw the strap pictured there?

(Testimony of Gerald J. Trubow.)

A. No, I did not.

Mr. O'Gara: I think perhaps the Court may want to recess at this time. [87]

The Court: Yes, but for the purpose of the record, Mr. Lerer and Mr. O'Gara, in view of the stipulation that was made, I am going to release and allow counsel to withdraw his stipulation, and then you may produce your foundation, lay your foundation and introduce the photograph into evidence. It is now in for identification. [88]

* * * * *

CARRUTH JOHN WAGNER

called on behalf of the defendant, sworn.

The Clerk: Q. Would you state your name to the Court? A. Carruth John Wagner.

Direct Examination

Mr. O'Gara: Q. Dr. Wagner, what is your profession?

A. I am a doctor of medicine employed by the United States Government.

Q. Do you have a specialty, Doctor?

A. Yes, sir.

Q. What is that specialty?

A. Orthopedics.

Q. How long have you been an orthopedic surgeon?

A. I have been in charge of the service at the United States Marine Hospital since 1946.

* * * * *

Q. In addition to the X-rays, did you take certain photographs of the elevator door and the

(Testimony of Carruth John Wagner.)

elevator, parts of the elevator involved in the accident in question? A. Yes, sir.

Mr. O'Gara: May we have marked for identification these three photographs?

The Clerk: All of them?

Mr. O'Gara: Yes.

Q. At whose request did you take these photographs? A. Commanding officer's.

Q. That is, the commanding officer of the United States Marine Hospital? A. Yes.

Q. Did you also take black and white pictures?

A. No, sir.

Q. Showing you government's exhibit A for identification, is that a picture which you took from the inside of the car? A. No, sir.

Q. Do you know who took that picture?

A. Yes, sir. [90]

Q. Who was it?

A. This was taken by Henry Rayfield, who is the chief photographer of the veterans' hospital, Fort Miley.

Q. Was that taken at the same time that the color pictures were taken?

A. I think it was taken two or three days thereafter.

Mr. Lerer: Now just a moment. I am going to object to that as calling for the opinion and conclusion of the witness. First of all, he thinks—secondly, he wasn't present at the time the pictures were taken and doesn't know the time at all.

Mr. O'Gara: Q. Were you present at the time

(Testimony of Carruth John Wagner.)

these pictures were taken? A. Yes, sir.

Q. The second pictures? A. Yes, sir.

Q. Rayfield's picture? A. Yes, sir.

Q. Is it your recollection that they were taken at some day after your color pictures?

A. That's right, sir.

Q. That is, this picture, government's exhibit A for identification? A. Yes, sir.

Q. Were you physically in the presence of Mr. Rayfield?

Mr. Lerer: Still make the same objection, if counsel is [91] going to examine on that photograph. I presume that it hasn't been introduced in evidence yet, your Honor.

The Court: No, that is the photograph that was identified, and then was not admitted into evidence.

Mr. Lerer: Yes.

The Court: But are you objecting now, Mr. Lerer?

Mr. Lerer: Yes, I am, your Honor. I don't know the time nor the circumstances surrounding the taking of that photograph.

Mr. O'Gara: We will proceed with the color photographs first and come back to this.

The Court: Well, I was going to say, if you desire to lay a further foundation, you may do so.

Mr. O'Gara: Yes.

Q. Do you recall at what time of the year, what month, what day, as best you can recall, the color photographs which are identified as exhibits for identification for the government B, C, and D, and

(Testimony of Carruth John Wagner.)

which are now handed to you, were taken?

A. As best I can remember, it was approximately some time in May or June.

Q. If I told you that the accident in question occurred April 22nd, does that assist your recollection?

A. Not to the day, no, sir, because I can't recall the day, and I have no note of it.

Q. But it is your testimony, as I understand it, that you took the pictures after April 22nd, the date of the accident? [92]

A. That's right, sir.

Q. These pictures were taken by you with your own equipment? A. That's right, sir.

Q. At the time that you took these pictures, who was present besides yourself, if anyone was?

A. There was Dr. Mallory, who is the commanding officer, Dr. Casper, who is the executive officer, and Dr. Crane, who is the pathologist.

Q. At the time that you took these pictures, you photographed what appears to be an elevator door. Will you tell us exactly where the location of that door was, referring now——

Mr. Lerer: Just a moment. Are we examining on that picture introduced for the purpose of identification? If so, I want to make an objection.

Mr. O'Gara: No, the three photographs.

The Court: Do you desire to offer them in evidence?

Mr. O'Gara: Not at this point, your Honor;

(Testimony of Carruth John Wagner.)

there will be further identification as to the photographs.

The Court: All right.

Mr. O'Gara: Q. Referring to photographs for identification defendant's B, C, and D, will you tell us what elevator door, if it is an elevator door, those pictures represent, where the door is located?

A. This is the picture taken of the freight elevator from the basement floor, two of them from without and one of them [93] from within.

Q. Will you tell us which are the pictures taken from without the elevator door and which is the picture taken from within?

A. B and C were taken from without, D was taken from within the elevator.

Mr. O'Gara: At this time, Your Honor, we offer in evidence defendant's exhibits for identification B, C and D.

Mr. Lerer: Well, I am going to object to that, may it please the Court, upon the ground that no proper foundation has been laid, and that the time element, which is very important as far as these pictures are concerned, has not been established; and upon that ground I make the objection.

The Court: Well, really the basis of your objection is that the time, if any, these witnesses said it was sometime in May or June of that year, is too remote from the period of time at which the accident occurred.

Mr. Lerer: Yes, your Honor; not only too remote, but secondly, we don't know the time def-

(Testimony of Carruth John Wagner.)

initely, and thirdly, we don't know whether those pictures truly represented the condition of the elevator at the time the accident occurred.

The Court: Well,——

Mr. Lerer: Three grounds, your Honor.

The Court: Well, upon the ground of improper or no proper foundation, there are photographs of the door. Now the weight of that evidence, of course, can be challenged, but as to its [94] admissibility, I think it is admissible and I will permit them to be admitted into evidence according to the numbers marked for identification B, C and D and I will have to overrule the objection.

(Whereupon photographs referred to above were received in evidence and marked defendant's exhibit B, C and D.)

Mr. O'Gara: Q. Now referring to government's exhibit A for identification, you have testified it was taken by the official photographer from Fort Miley. Were you present when this picture was taken?

A. Yes, sir.

Q. Is it your testimony that this exhibit A was taken shortly after a matter of a day or so following B, C, and D?

A. I think it was a little longer than a day. I think it was upwards to a week or ten days, because I arranged for him to come out and take the pictures.

Q. At any rate, it followed the taking of the color pictures? A. That's right, sir.

(Testimony of Garruth John Wagner.)

Q. And this black and white picture was taken in your presence?

A. Well, I was present. I showed him where the elevator was and he took the picture.

Q. Did you watch him take the picture?

A. I can't remember specifically whether I saw him take the camera and hold it and take the picture, no, sir. [95]

Q. You saw him with his camera?

A. Yes, sir.

Q. Subsequently he gave you this picture?

A. No, sir, this picture was turned over to the commanding officer of the hospital.

Q. The commanding officer of the hospital?

A. Yes, sir.

Q. You reviewed it in the presence of the commanding officer after his receipt? A. No, sir.

Q. You saw it?

A. I saw the picture, the photograph, yes, sir.

Q. Do you recall the elevator in question?

A. I recall it, yes, sir.

Q. Have you used that elevator?

A. Yes, sir.

Q. Did you use the elevator subsequent to the accident in question?

A. On several occasions, yes, sir.

Q. On several occasions; particularly at the time that those pictures were taken, did you enter the elevator? A. Yes, sir.

Q. Will you tell us whether——

(Testimony of Garruth John Wagner.)

The Court: When you say "those pictures", you mean B, C and D? [96]

Mr. O'Gara: Thank you, your Honor.

Q. B, C and D. At the time B, C and D were taken by yourself, and subsequent to that in that same period, did you enter that elevator?

A. Yes, sir.

Q. Did you have occasion to look at the inside of the elevator?

A. I noticed it, yes, sir.

Q. Will you tell us whether or not government's exhibit for identification A represents the conditions which were present at the time that you examined them in the elevator shaft and the elevator cage, and at the time that you took color photographs B, C and D?

Mr. Lerer: I am going to object to that question, may it please your Honor, as the time being too remote and everything—having nothing to do with April 22, 1949, when the accident occurred.

The Court: Well, I recognize there is going to be argument on this as to its weight and as to its admissibility, but since I have let the others in, I am going to allow this one in as defendant's exhibit A. But I might say to counsel, unless these are properly connected up, there is going to be some problem on their weight, and perhaps as to their admissibility on a motion to strike, if made later.

Mr. O'Gara: Yes, your Honor, we are prepared through this witness and other witnesses to develop their materiality. [97]

(Testimony of Garruth John Wagner.)

The Court: All right, you may proceed.

(Whereupon, defendant's exhibit A, being a photograph, was received in evidence so marked.)

Mr. O'Gara: Q. Now referring to government's exhibits B, C and D, it is your testimony that these were taken on the basement floor, particularly as to D, to recall this, do you remember whose hand is shown holding the handle?

A. Yes, sir.

Q. Whose hand is that?

A. That is Dr. Casper, the executive officer.

Q. Looking at D, that is Dr. Casper's hand holding what appears to be a strap? A. Yes, sir.

Q. Did you see that strap? A. Yes, sir.

Q. The strap is attached to what part of the door, the upper or the lower?

A. The upper half.

Q. The upper half. And in using the elevator in question, have you ever used that strap?

A. Yes, sir.

Q. Would you tell us in what manner you have used it?

Mr. Lerer: I object to that as being incompetent, irrelevant and immaterial, not within the issues of the case as to how and where he used the strap subsequent to April 22, 1949. [98] It is not within the issues.

The Court: Well, if you will direct it to a period of time, counsel; the objection at the moment is

(Testimony of Garruth John Wagner.)

sustained. You may proceed further, though, to qualify this testimony.

Mr. O'Gara: Yes, your Honor.

Q. Prior to April 22, 1949, the time of the accident in question, did you use this elevator?

A. Yes, sir.

Q. And on occasions have used it prior to April 22, 1949?

The Court: Well, how soon?

Mr. O'Gara: Q. How soon did you use it?

A. I have no idea of the exact dates.

Q. Well, in the course of your business in the hospital, did you have to go from top to bottom?

A. I use that freight elevator on occasions, yes.

Q. In the course of your use prior to April 22, did you go to the basement floor of the hospital?

A. I have used it from the basement floor of the hospital, yes, sir.

Q. And at that time, will you tell us in what way you opened or closed the doors in the elevator?

Mr. Lerer: I make the same objection, may it please the Court; incompetent, irrelevant and immaterial, not within the issues of the case, too remote from the day of the accident.

The Court: Well, I will sustain the objection, and I will [99] say to you, counsel, that unless the witness did so use it and can place it within some degree of proximity to this accident, or when he can place it—if he can say that it was within a month's period of time or something like that, why

(Testimony of Garruth John Wagner.)
then we can determine whether or not it is material here.

Mr. Lerer: Your Honor, may I continue with this objection, and if I might request that a closer proximity of time than a month? That strap could have been torn off a couple of days before.

The Court: Well, we understand that, but this will have to go to its weight, and he certainly has a right to describe the condition as to when he saw it, if it is within a close enough period of time to be material.

Mr. O'Gara: Q. Can you tell us, Dr. Wagner, whether or not you used this elevator during the period April 1st to 22nd?

A. No, sir, I did not. [100]

* * * * *

CARL R. SHEPHARD

called on behalf of the defendant, sworn.

Direct Examination

Mr. O'Gara: Mr. Shepard, where do you reside?

A. San Francisco, 2447 Cabrillo.

Q. What is your occupation?

A. Mechanical engineer.

Q. How long have you been a mechanical engineer?

A. Oh, about 20 years.

Q. Are you connected with the federal agency in charge of the public buildings?

A. That's correct, yes.

Q. What is that agency?

(Testimony of Carl R. Shephard.)

A. Public Building Service, General Service Administration.

Q. How long have you been with the Public Service Administration? A. 18 years.

Q. Were you so employed during the year 1949?

A. I was employed in the Seattle office at that time.

Q. Prior to your Seattle assignment, were you in the San Francisco office? A. Yes, sir. [158]

Q. What period of time did you occupy in San Francisco that position, or did you have a San Francisco assignment?

A. From February, 1935 to August 17, 1948.

Q. Then you went to Seattle?

A. Went to Seattle.

Q. You returned to San Francisco when?

A. December 19, 1949.

Q. You are presently with the San Francisco office? A. That's correct.

Q. Do you have the joint custody of the records relating to the inspection of elevators?

A. Yes, sir.

Q. And do you have custody of records relating to inspection of elevators in 1949, particularly the elevator known as the freight-kitchen elevator at the Marine Hospital? A. Yes, sir.

Q. Did you bring at my request the record made of an inspection in 1949? A. Yes, sir.

Q. What inspections were made in 1949?

A. There was one inspection——

Mr. Lerer: Well now, I am going to object, your

(Testimony of Carl R. Shephard.)

Honor, may it please the Court. I object to the question upon the ground it is incompetent, irrelevant and immaterial and no definite times set.

The Court: Well, he asked him what inspections were made. I will overrule the objection now, because this is just preliminary. We will find out what the point is when we get to the answer.

Mr. O'Gara: Q. What inspections were made in 1949?

A. There was one inspection made in March, March 18, 1949, and one made on September 14th.

Q. 1949? A. 1949.

Q. In the year 1949, if you know, what was the period of time or the frequency of inspections?

A. We inspected them every six months at that time.

Q. This inspection that you refer to as having been made in March, 1949, of the Marine Hospital elevators, was made by whom?

A. Was made by Mr. William Volz, V-o-l-z.

Q. Now is the report that Mr. Volz made available at this time? Do you have it?

A. I have it with me, yes.

Q. You brought that from the office?

A. I brought that from our files in the office.

Q. Kept in the regular course of business?

A. That's right, sir.

Q. What did Mr. Volz—where is he?

A. Mr. Volz is deceased.

Q. When did he die, if you know?

A. October 28, 1949.

(Testimony of Carl R. Shephard.)

Q. Will you please produce the March and September, 1949, records of inspections?

A. Yes, sir (producing). I have a copy of the report, of the letter attached to the report and the report itself, for both September and March.

Q. Well, I think that the reports themselves will be sufficient.

A. We have a written report and then we have a regular inspection, elevator inspection report form. I don't know whether you want both of them or not. I have both of them.

The Court: Well, show them to counsel and let him examine them, and counsel for the plaintiff has a right to examine them too. Those are for both March and April of 1949?

Mr. O'Gara: March and September.

The Court: I am sorry—March and September.

The Witness: That's right.

Mr. O'Gara: We offer these in evidence, Your Honor, and ask that all of them, if the Court permits, be marked as a unit. They may be lettered also, but as the next exhibit in order for the government.

The Court: All right, defendant's exhibit——

Mr. Lerer: Well, I am going to object to it, may it please the Court. It is objectionable because it is only a [161] self-serving declaration of somebody who went at a time some time a month or two before the day of the accident, and two months subsequent to the accident, and it might very well be that the strap was on the door at the time. We are con-

(Testimony of Carl R. Shephard.)

fronted with a particular date when my client was in the place and the strap was missing.

The Court: Yes, but the probative value—you are talking about probative value?

Mr. Lerer: Not only the probative value, but I say that an improper foundation has been laid, Your Honor, because it is too remote in time. Secondly, it is only a self-serving declaration.

The Court: Well, the subsequent one there may be so; there may be some merit to that, but this investigation made a month and two days, on the 18th of—this was made on March 18th, and the accident occurred on April 22nd, I understand—that would be a month and four days. It seems to me that that is within a proper period of time. But it does go to its probative value, the difference, and I don't think it goes to its admissibility. Therefore I am going to allow it to be admitted. Now as to the subsequent one, I don't think it is material. I think you are right on that.

Mr. O'Gara: Well, we might even facilitate matters by withdrawing the subsequent one. That would only go to the regularity of inspection, your Honor.

The Court: Well, he says the report has been made and he has testified to that, so it may be admitted into evidence, and the September record will not. The May report may be received.

Mr. O'Gara: All right.

The Court: And the May report will now be admitted into evidence.

(Testimony of Carl R. Shephard.)

Mr. O'Gara: Pardon me, your Honor. The March report.

The Court: I mean the March report. I am sorry.

Mr. O'Gara: And I will return this to the witness.

The Court: What number will that exhibit have, Mr. Clerk?

The Clerk: H, your Honor, defendant's H.

The Court: Defendant's exhibit H. All right. Are there two subdivisions to that?

The Clerk: Yes, your Honor.

The Court: A and B?

The Clerk: H-1 and 2.

The Court: Oh, H-1 and 2. I am sorry.

(Whereupon inspection report from Volz to Sanger and elevator inspection report, referred to above, were received in evidence and marked defendant's exhibits H-1 and H-2.)

Mr. O'Gara: Q. Now, Mr. Shephard, in the course of your duties do you inspect elevators?

A. Yes, sir.

Q. How long have you been an inspector of elevators? [163]

A. Well, 17 years, about.

Q. Do you inspect the elevators maintained in buildings operated and serviced, operated and maintained by the Federal Government?

A. All federally owned and operated buildings.

Q. And buildings in the bay area?

A. Yes, sir, and Nevada and Arizona.

(Testimony of Carl R. Shephard.)

Q. Do you inspect the Marine Hospital elevators? A. Yes, sir.

Q. Are you familiar with the elevator here in question? A. I am.

Q. Showing you government's exhibit B, C and D—A, B, C, and D, rather—will you kindly——. A is for identification, I believe?

The Court: No, I have admitted that.

Mr. O'Gara: Yes, that's right.

Mr. Lerer: Your Honor, I think these were introduced only for the purpose of identification, these pictures. I don't think they were introduced in evidence, were they?

The Court: Yes, they were admitted into evidence over objection, counsel, and he is now going to further identify them and tie them up so that we will——

Mr. Lerer: I see.

The Court: I have said that if they weren't further connected, that a motion to strike would be in order. [164]

Mr. Lerer: I see.

Mr. O'Gara: Q. Have you examined those photographs, Mr. Shephard? A. Yes, sir.

Q. Can you identify those photographs as being related to the elevator at the Marine Hospital?

A. That is it, that's right.

Q. That is the elevator? A. Yes, sir.

Q. Are you familiar with the means provided or the device provided on the inside of the door?

A. Yes, sir.

(Testimony of Carl R. Shephard.)

Q. Of that elevator in the basement? Now what is that means? What is it?

A. It has a strap.

Q. What is it made of?

A. Well, it is made of canvas, the lower part of the strap is fastened to a metal strap.

Q. Canvas or leather?

A. Canvas or leather. It is either made of canvas or leather.

Q. Now do you know who replaces those straps if they may be, or if it is necessary to replace them?

A. Maintenance forces at the hospital.

Q. At the hospital? [165]

A. Yes, sir.

Q. Do you inspect and report to the maintenance force at the hospital?

A. When an inspection report is made, it is given to the hospital.

Q. Now is the inspection that you conduct the same kind of inspection, if you know, which Mr. Volz conducted?

A. Absolutely. They are standard.

Q. In the course or following it——

A. Same procedure.

Q. Following the inspection, do you report to the individual at the hospital reponsible for the maintenance of——

A. I report. I report it to him verbally before I leave if I find anything like that missing.

Q. Now who is that individual?

A. That is the superintendent, Mr. Bellamy.

(Testimony of Carl R. Shephard.)

Q. Was Mr. Bellamy the superintendent at the time that this accident was supposed to have occurred, April, 1949?

A. I believe he was. I wasn't here then, but I believe he was, before I left. I take it he was— I take it for granted he was while I was gone.

Q. Will you tell us whether there are any other buildings in San Francisco which you have inspected which employ this type of elevator?

A. Right in this building. [166]

Q. Right in this building; and others?

A. Federal Office Building.

Q. Do you know how long this kind of elevator door has been in use anywhere?

A. On that kind of elevator, that kind of door has been in use, I should say, for 25 or 30 years.

Q. And do you know——

A. It is a standard type of freight elevator door, what is called a bi-parting hoist-way door.

Q. Do you know if this kind of elevator door is used on civilian installations as well as government?

A. Yes, sir.

Q. You have seen those? A. Oh, yes.

Q. Is there any other inspection service provided for this elevator?

A. No, only the inspection that the maintenance force makes from time to time.

Q. That is the staff of the hospital?

A. That's right.

Q. But no elevator service?

A. No regular inspection is made by the public

(Testimony of Carl R. Shephard.)

buildings service. They make a maintenance inspection from time to time. I don't know how often they do that. I suppose they have a routine. [167]

Q. The State inspects, makes no inspection out there?

A. The State inspects—to my knowledge, it makes no inspection. But they are welcome to, if they want to, but they don't. They don't want to come into federal property.

Q. Federal property is inspected by you and others? A. That's right.

Q. Now on the basis of your experience and particularly your inspection experience, will you tell us whether or not this type of freight elevator door was usual or unusual, this type of door?

A. Well, I would say it is a usual type of door.

Mr. O'Gara: No further questions.

Cross-Examination

Mr. Lerer: Q. Mr. Shephard, you don't know as to whether on April 22nd, 1949, there was a rubber or canvas extension on this elevator we have been talking about, do you?

A. I do not.

Q. As a matter of fact, you were out of the city between——

A. That's correct.

Q. During that time, I think the date was——

Mr. O'Gara: April 22, 1949.

Mr. Lerer: Q. August, 1948, to December, 1949?

A. That's correct, sir.

Q. So what transpired on the premises is only

(Testimony of Carl R. Shephard.)

what you know from somebody who has passed away and made a written report? [168]

A. That's right.

Q. Now looking at defendant's C, do you there see any strap that is hanging down?

A. None.

Q. I see.

Mr. Lerer: That's all. Oh, just a moment.

Q. If Mr. Volz, who has passed away, or anyone else had seen the elevator in this condition, what would their report have been to you?

A. Well, he would have reported that on that inspection report that you saw there.

Q. But you had no such report at any time, did you, that there was a strap missing from this elevator? A. I did not.

Mr. Lerer: That is all.

Redirect Examination

Mr. O'Gara: Q. Mr. Shephard, looking at defendant's C, isn't that a view of the outside of the door?

A. That is the outside of the door.

Q. Isn't it a view that would not show the strap?

A. There wouldn't be any strap on the outside of the door.

Q. The handle is on the outside?

The Court: Unless it hung down from the inside.

A. The strap is always on the inside.

The Court: Let me ask this question, though, right on [169] this point, so we can understand this. Does

(Testimony of Carl R. Shephard.)

not the strap extend below the base of the top of the—the base of the top door?

The Witness: Yes, it would, when it got down from this far from the opening, the strap would extend below this point (indicating).

Mr. Lerer: Here is a picture, No. C, your Honor, that shows it.

The Court: Let him look at No. C, counsel.

Mr. O'Gara: I think the witness has C.

The Court: He has C here now. That is what we are referring to.

The Witness: C is the outside of the door, and the point is that it would be visible between the doors if something weren't obstructing the view.

Mr. O'Gara: Q. Looking at defendant's C, Mr. Shephard, from that picture can you tell us whether or not the strap behind is being held up by the left hand of the individual who is posing there?

A. I can't tell. That is impossible to tell. I can't see.

Mr. Lerer: I think the picture speaks for itself, your Honor.

The Court: The picture speaks for itself. You can show him the other pictures.

Mr. O'Gara: Q. Now looking at picture D, can you tell [170] us whether or not the strap pictured in picture D,——

A. That is the strap inside the elevator.

Q. Now if the hand pictured in picture D, the hand pictured there, were holding the strap between C,—or rather, were holding the strap when the picture

(Testimony of Carl R. Shephard.)

C was taken, would it be your testimony that the strap would be invisible in C?

The Court: Well, I think——. I mean, counsel, that is a conclusion that the Court can draw.

Mr. Lerer: Not an x-ray picture, your Honor. You could just look at it.

The Court: Yes. In other words, that is argument, counsel. This witness doesn't have to prove that.

The Witness: It looks to me, if I may say so, as if in this picture D, that he was opening the elevator, pushing the elevator door down.

Mr. Lerer: Well, I don't know, Mr. Shephard—you are getting into what happened. You just don't know. I just have one question to ask, your Honor.

Recross-Examination

Mr. Lerer: Q. I show you defendant's D and ask you to take a look at that strap.

A. Yes, sir.

Q. I now show you exhibit A and ask you to look at that strap. Now both those evidently are pictures of the inside of this particular elevator, are they not? [171]

A. Yes, sir.

Q. And are those straps the same?

A. No, one of them is broke.

Q. They are different?

A. One of them is broken off.

Q. How about besides one of them being broken off—wouldn't you also say that the shape of those two straps are different? A. Well,——

(Testimony of Carl R. Shephard.)

Q. Just take a look at it, Mr. Shephard, and look on top of the strap, where one is round and the other, the ends are cut off. Wouldn't you say that is another difference?

A. That is a difference. There appears to be a difference there on top of the strap.

Q. Yes. And isn't there a third difference that you haven't seen?

A. Well, the third difference that I see, that it doesn't have the tailpiece on it.

Q. All right. Then isn't there a fourth difference you haven't seen?

A. Let me see. (Examining.)

Q. Well, let me point out to you, to save time, Mr. Shephard. A. Sure.

Q. Take a look at the screw that is holding the rubber handle on exhibit A. Take a look at that.

A. You don't mean the rubber handle, you mean the strap? [172]

Q. The strap.

The Court: Well, is that rubber or leather?

The Witness: I can't tell. It looks like leather. Well, the strap—you are talking about the strap?

Mr. Lerer: Yes, the strap.

Q. Take a look at the metal or the metallic substance holding the strap on defendant's D, and see if that isn't a fourth difference in the two straps; is that correct?

A. Well, let's see. There is something on there.

Q. Yes.

A. There is something on there, it is either—

(Testimony of Carl R. Shephard.)

they are both fixed with a nut, but there is something beneath the nut on the other thing.

A. A appears—it appears there have been two attempts to put straps on that particular elevator, doesn't it? A. I wouldn't say two attempts.

Q. All right, let's say one attempt; is that correct?

A. Well, it looks like there had been——. It don't look like the same strap to me.

The Court: There has been a change?

Q. (By Mr. Lerer): There has been a change?

A. May have been trimmed with a knife, but it has been changed. It is not the same.

Q. Have you anything in your reports to show that Mr. Volz or anyone else inspected those premises and showed that a [173] strap should be changed?

A. No, the report is what you have there.

Mr. Lerer: Yes, that's all. Thank you.

Further Redirect Examination

Mr. O'Gara: Mr. Shephard, looking at these two photographs, A and D, could you tell us whether or not those are the same doors pictured?

A. Oh, sure.

Q. Are you positive?

A. I would stake my life on it.

Mr. Lerer: Do you know what that means?

Mr. O'Gara: No, I——

The Court: He is saying positively that they are. I will permit the language to stand and interpret it to mean that.

The Witness: I am sorry, Judge.

(Testimony of Carl R. Shephard.)

Q. (By Mr. O'Gara): You know there are several floors in that building, Mr.——

Mr. Lerer: Well now, are you trying to impeach your own witness, counsel? That is what he is doing, your Honor.

The Court: Well, are you objecting on that ground.

Mr. Lerer: I am objecting on the ground that he is attempting to impeach his own witness.

The Court: I haven't heard the question yet, and when he does start to impeach his own witness, you may object. He has the right, counsel, to explain his testimony. [174]

Mr. Lerer: Well, the witness has, your Honor. If he wants to change his testimony.

The Court: And counsel has the right to recall other matters to his attention that may be explanatory in this matter, rather than in the sense of being inconsistent.

The Clerk: Exhibit I for identification.

(Whereupon photograph of elevator referred to above was marked defendant's exhibit I for identification.)

Mr. Lerer: Well, that has——

The Court: That is something that is going to be introduced in evidence?

Mr. O'Gara: Yes.

The Court: You may examine it, counsel.

Mr. Lerer: I didn't see this one before, your Honor. This is new.

(Testimony of Carl R. Shephard.)

The Court: Well, you have the right to examine it before it is offered, and before it is offered for identification. Has it been identified yet?

Mr. O'Gara: It has been identified as exhibit I for identification.

The Court: All right.

Q. (By Mr. O'Gara): Now looking at I for identification, will you compare the picture——

The Court: No, just a moment. You had better qualify that picture before you have him compare it. [175]

Q. (By Mr. O'Gara): Can you identify that picture, what it represents?

A. That is the exterior, the door of the elevator from the outside, from the kitchen side.

Q. Now, Mr. Shephard, referring to I——

A. This is I?

Q. Yes. Referring to the picture of the strap, will you compare, please, and examine the strap pictured there and the strap pictured here in D?

Mr. Lerer: Well, just a moment, counsel; it hasn't been introduced in evidence, and I make the same objection to that picture. I don't know the time it was taken and it is too remote from the time of the accident.

The Court: Well, do you offer it in evidence, Mr. O'Gara?

Mr. O'Gara: Yes, we offer it in evidence on the basis of this witness' testimony that this is a picture of the exterior kitchen side of the elevator entrance.

(Testimony of Carl R. Shephard.)

Mr. Lerer: Ask him when it was taken.

The Court: Well, he has a right to know that.

Mr. O'Gara: Yes.

Mr. Lerer: When was it taken?

Mr. O'Gara: This witness, of course, would not know that.

Mr. Lerer: Well, that is your answer.

The Court: Well, until we have some idea of the time it was taken, I think the objection is well taken, Mr. O'Gara. [176]

Mr. O'Gara: Well,——

The Court: I mean, you had better identify that picture for us from someone who knows when it was taken, so that it may be introduced in evidence. I assume that it is a picture that might have been taken recently, for instance, but you would have to explain those factors to this witness so that he could make a proper comparison.

Mr. O'Gara: In explanation, it was only with the thought of saving time, your Honor. I realize that counsel certainly is entitled to a full and complete foundation as to the origin of the picture.

The Court: Well, he has made his objection and it is sustained, and until you do properly lay the foundation, I will have to rule that it is not permissible to use in evidence.

Mr. O'Gara: Well, if the picture were limited at this time as evidence only as a picture of the strap shown in the picture already in evidence, defendant's A, perhaps we can do it that way.

Mr. Lerer: For what purpose, counsel?

(Testimony of Carl R. Shephard.)

Mr. O'Gara: Well, I think we will save time if I simply explain that the purpose of all this is to show that the two straps photographed, the strap photographed in D and photographed in A, are different straps on different floors, entirely different.

Mr. Lerer: Well, do I understand you are trying to [177] introduce in evidence a door that has been identified as a door involved in this accident and that that isn't the door?

Mr. O'Gara: No, that wasn't the testimony at all.

Mr. Lerer: Well then, what are you trying to say? I don't follow you, counsel. I mean, there are two different doors?

Mr. O'Gara: The testimony of the doctor who identified defendant's exhibit A was that it was a picture of the interior of the elevator car and there was no testimony as to the floor or the door involved in the accident. There is no testimony at all in that respect.

The Court: But this witness has identified it as being the door in the picture.

Mr. O'Gara: I think this witness has already indicated that he didn't know.

Mr. Lerer: He said it was identical, and that is the time that I left, your Honor, just to refresh your memory. He said that is identical, and that is the evidence.

The Court: Well, if the witness desires to correct his testimony, he may do so.

The Witness: I didn't—I don't believe you asked me, counsel, which door that was.

(Testimony of Carl R. Shephard.)

Q. (By Mr. O'Gara): Well, that is what I was going to get to, but I was blocked.

The Court: Well, refer to defendant's exhibit A, which [178] is the one that is under discussion, and we will leave I out of this thing. Interrogate the witness about it and find what his recollection is.

Q. (By Mr. O'Gara): The question is whether or not you know from examining those pictures, whether they refer to the same door.

A. I don't know, on the inside, no.

The Court: He does not know whether A and D are the same door? All right.

Further Recross-Examination

Q. (By Mr. Lerer): Can you tell from this which door was involved in the accident?

A. I can't.

Q. You can't. A. No, no, sir.

Q. So all that you have testified from these photographs is that it is just a door in the Marine Hospital?

A. That's right, that is the Hoist-way elevator door. Which one, I don't know.

Mr. Lerer: That's all.

Mr. O'Gara: No further questions.

(Witness excused.)

The Court: Are there any further questions of this witness?

Mr. Lerer: No, other than I would like to know—I have [179] no further questions.

The Court: You are excused, Mr. Shephard.

Mr. Lerer: Perhaps we might ask the reporter to check the testimony of the doctor. It is my recollection that he said that he took the photographer downstairs and he didn't stay there actually while he took it, but he testified that that actually was a picture of the door involved in the accident. I definitely remember that.

Mr. O'Gara: Well, if that was the testimony, I don't recall it. It is my recollection that the testimony was that the man got into the car and the purpose of the picture was a picture of the inside of the car.

The Court: Well, my recollection of his testimony is that it was a photograph taken by the photographer at Fort Miley a week or ten days after B and C and D were taken.

Mr. Lerer: Yes.

The Court: Now I am not entirely positive that the witness said it was the same door, but that is the record, and the record is the way it is. Now if you want to correct it, it is up to you to do it, Mr. O'Gara.

Mr. O'Gara: Yes. Well, your Honor, I think that it might be desirable to make it absolutely clear with Doctor——

The Court: That is up to you. The record is in the condition that it is in now.

Mr. O'Gara: As I recall, I was particularly careful. I [180] asked him whether or not he went into the elevator and he said no, he didn't go in the elevator and he wasn't with the man when he used his camera.

Mr. Lerer: He said he took him downstairs to the door and left him there.

The Court: Let's not argue now. The point is that the record is in the shape that it is in, and whatever the record shows will be what you are going to have to stand on, Mr. O'Gara.

Mr. O'Gara: Yes.

The Court: And the burden is on you to either make the effort to correct it if it needs correcting, or stand on what there is.

Mr. O'Gara: Yes. Well, I think that the best thing would be to recall Dr. Wagner and clarify the record.

The Court: That's your privilege. You may do so.

* * * * * [181]

WILLIAM B. BELLAMY

called on behalf of the defendant, sworn.

* * * * *

Direct Examination

Q. (By Mr. O'Gara): Mr. Bellamy, where do you reside?

A. 315 Magellan Avenue, San Francisco.

Q. What is your occupation?

A. Building superintendent, United States Marine Hospital, San Francisco, California.

Q. How long have you been the building superintendent there?

A. Went there on May 18, 1947. [182]

Q. You were the acting building superintendent in May, 1949? A. That's right.

Q. Shortly after April 22nd or at some time after April 22, 1949, did you learn of an accident in the so-called freight kitchen elevator?

(Testimony of William B. Bellamy.)

A. I did, sir.

Q. And following—when was that, if you recall? When was that that you first heard of it?

A. It was either on May 11th or May 12th.

Q. When you heard of it, what did you do with respect to the elevator?

A. I went for the medical officer in charge and made an inspection of the freight elevator.

Q. Who was the person you went to see about this? A. Dr. Charles R. Mallory.

Q. Showing you government's exhibits B, C and D, will you tell us in particular,—well, I think we can eliminate B and C. Now looking at defendant's D, will you tell us whether or not that picture represents the elevator when you inspected it in May, 1949?

Mr. Lerer: May I take a quick look at it?

Mr. O'Gara: Oh, yes.

Q. In respect to the door strap, particularly?

A. I can't state for sure, sir.

Q. Do you recall making your inspection? [183]

A. When I went down, everything was satisfactory at the time.

Q. Well, you recall making the inspection, of course? A. Yes, sir.

Q. At that time did you inspect the door to see whether or not the door had a strap?

A. Well, if they hadn't been a strap on the door, we wouldn't have considered it satisfactory.

Q. Now did you, following your inspection, require any work to be done on the elevator?

(Testimony of William B. Bellamy.)

A. No, sir.

Q. Prior to your inspection, between April 22nd and the time you made your inspection, did you or did any person at your direction make any repairs on that elevator?

A. Not to my knowledge. As I remember, on the 18th of March the elevators were inspected by the mechanical engineer from the public building administration, and at that time——

Mr. Lerer: We are going to object to that and ask it be stricken as not responsive.

The Court: That's right. Let's—. Mr. Bellamy, let's confine your answer to his direct question. You may anticipate something, but he will be asking you those questions in the future.

Q. (By Mr. O'Gara): Mr. Bellamy, the building elevators at the Marine Hospital are inspected regularly, are they not? A. Yes, sir. [184]

Mr. Lerer: I am going to object to that, that whole line of questioning, as being incompetent, incompetent and immaterial. We are more concerned with the date of April 22nd, 1949, your Honor.

The Court: Well, I will overrule that objection.

Q. (By Mr. O'Gara): In 1949, prior to April 22, 1949, was there an inspection?

A. Yes, sir, it was made on March 18, 1949.

Q. Now did you consult your records to determine——

A. I brought the cards that are in the elevators, sir.

Q. Well, you may—counsel may want to examine

(Testimony of William B. Bellamy.)

them, but I think they are just cumulative of what Mr.——

The Court: Well, all right. If you do not desire to produce them, you don't have to.

Q. (By Mr. O'Gara): Mr. Volz made the inspection. Did you see Mr. Volz on the occasion of that inspection?

A. No, sir, I had gone on the 13th of March back to Washington, D. C., and I didn't return until three o'clock the morning of April 21st.

Q. You were there April 21st? A. Yes, sir.

Q. Now in coming to court here today, at my request, did you check your records to determine whether, between March 18, 1949, and April 22, 1949, there was any report of any inspection other than Mr. Volz'? [185]

A. I consulted with my maintenance men and they said that they hadn't done any work on the elevator to the best of their knowledge.

Mr. Lerer: We are going to object to that as calling for the opinion and conclusion of the witness and ask that it be stricken.

The Court: The answer is stricken and the answer will be "No"; that will stand. The answer will be that there was no inspection made.

Mr. O'Gara: All right.

Q. Work orders are prepared, of course, for the work done on the elevator, is that correct?

A. Yes, sir.

Q. Or any of them? A. Yes.

Q. Did you check your records for any work orders between March 18, 1949?

(Testimony of William B. Bellamy.)

A. The record is unavailable.

Q. On April 22, 1949?

A. We received—can I explain this?

The Court: Did you say the records are in the elevator—if you say they are unavailable, why——

The Witness: We receive between five and six hundred work requests a month, and as you can see,—I mean, it would be impossible for us to maintain a complete file from year to year. [186]

Q. But you have no record of any work done on this elevator between March 18th and April 22nd?

A. No, sir.

Q. 1949. Now when you made your inspection,—

The Court: Well, just a moment. I would like to ask a question here. When you say "No, sir," and you say you have no record, does that mean that there was no record of any work done or that the record, if there was one, would be destroyed?

The Witness: The records would have been destroyed, sir.

The Court: All right.

Q. (By Mr. O'Gara): All right. Now in connection with your inspection in April or May, 1949, as I recall it was on May 11th—is that what you said?

A. It was either the 11th or the 12th, sir. I am not sure. But when we were notified that the suit was being brought, Dr. Mallory asked me to make an inspection.

Q. And when you made that inspection, did you order any work to be done? A. No, sir.

Mr. O'Gara: No further questions.

(Testimony of William B. Bellamy.)

Mr. Lerer: No questions.

(Witness excused.)

The Court: All right.

Mr. Lerer: Other than one question.

The Court: Will you take the seat again, please?

(Witness resumed the witness stand.)

Cross-Examination

Q. (By Mr. Lerer): If somebody would put a strap on, would there be a record of it in particular?

A. There would be a record if it was among our current work orders. That far back, there would be no record remaining.

The Court: Would there have been a record made at the time it was put on?

The Witness: Yes, sir.

The Court: Is that invariably true in a minor repair?

The Witness: Well, I can't say that they would put everything down, sir. That is impossible.

Q. (By Mr. Lerer): Well, Mr. Bellamy, you know as a matter of fact, that just taking a little strip there and tacking it up, there wouldn't be any of these usual forms filled out that are filled out in the hospital, would there?

A. Our forms aren't very complicated, sir, and we insist that they do, because we have a limited number of maintenance people, and if I don't, I can't schedule their work properly.

Q. So you would say that if a man did put up a

(Testimony of William B. Bellamy.)

strap like that, he would make out a complete record and report?

A. On the elevator inspections, they do, sir, because that is something we have to watch.

Mr. Lerer: That's all. [188]

Redirect Examination

Q. (By Mr. O'Gara): Mr. Bellamy, when you made your inspection in May, 1949, Mr. Mallory or Captain Mallory told you that there had been a claim filed in this matter, did he not? A. Yes, sir.

Q. And at that time isn't it a fact that — I shouldn't put it that way.

At that time did you review your records at Dr. Mallory's request in relation to this elevator?

A. No, sir, I didn't.

The Court: The answer is no, sir, he did not.

Mr. O'Gara: No further questions.

Mr. Lerer: That's all. Thank you, Mr. Bellamy.

(Witness excused.)

* * * * *

ALBERT T. MITCHELL

called on behalf of the defendant, sworn.

Direct Examination

Q. (By Mr. O'Gara): Where do you live?

A. I am stationed at the Marine Hospital.

Q. What is your occupation?

A. Storekeeper.

Q. Were you a storekeeper or assistant storekeeper in April, 1949? A. Yes, sir.

Q. Are you familiar, in general, with the action

(Testimony of Albert T. Mitchell.)

that is being heard here? The case of an alleged accident on the elevator?

A. Well, I am now. I have heard——

Q. Recalling April, 1949, were you on duty in the storeroom?

A. I was working that day, yes, sir.

Q. And working in the storeroom and about the storeroom in that vicinity?

The Court: Is this April 22nd, now?

Mr. O'Gara: Yes, April 22, 1949.

A. Yes, I was working that day.

Q. (By Mr. O'Gara): You have checked the records to make sure you were working that day?

A. Well, I didn't check, but I mean, within about six or seven months either before or after, I hadn't been off for over a year, and I know I was working that day.

Q. At that time while you were on duty, did anyone make a [190] request of you to use the freight elevator? A. No, not to me, sir.

Q. No one? A. No one.

Q. In connection with the removal from the hospital of certain beds and refrigerators, did you assist anyone? A. No, not me.

Q. Did you at any time, without a request, direct anyone on that day to use the elevator? A. No.

Mr. O'Gara: No further questions.

Cross-Examination

Q. (By Mr. Lerer): How many people on the floor that you were working at, Mr. Mitchell?

A. Working together?

Q. All the people at work on the basement floor

(Testimony of Albert T. Mitchell.)

or might come down there, people that you——

A. Well, there's five, the plumbing——

The Court: Will you speak up?

A. (Continuing): There's about twelve, sir, that work down there all the time.

Mr. Lerer: All the time. That's all.

Redirect Examination

Q. (By Mr. O'Gara): Mr. Mitchell, how many people work in the storeroom? [191]

A. Oh, in the storeroom, it's five.

Q. Well, on that particular day, do you know how many people were working?

A. There was four, because Mr. Fleming, he is our boss, he was on vacation.

Q. Who were the people working besides yourself?

A. Mr. Whittaker and Mr. Kellogg and myself. There was three of us.

Q. Three of you then? A. Yes.

Mr. O'Gara: No further questions.

Recross-Examination

Q. (By Mr. Lerer): Do you people come out of the corridors? You are in the corridors at will from time to time, aren't you?

A. Yes, because we have a pretty big area.

Mr. Lerer: Yes, that's all. Thank you.

The Court: What names were those, those other two people? Whittaker and who else?

The Witness: Kellogg—Mr. Kellogg.

Mr. O'Gara: I have no further questions.

(Testimony of Albert T. Mitchell.)

The Court: Any further questions, Mr.——

Mr. Lerer: No questions, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. O'Gara: Perhaps it will facilitate matters if the [192] two men he mentioned, Mr. Kellogg and Mr. Whittaker—Mr. Whittaker occupies a comparable position to this gentleman and would testify to the same effect. If counsel wants to save time and stipulate, fine. Mr. Kellogg, on the other hand, is a superior, a superintendent in that office, and it would be necessary to have him testify. But since Mr. Kellogg is here today and Mr. Whittaker is here today, perhaps it might be stipulated to save their return.

The Court: Well, I don't know whether counsel wants to stipulate.

Mr. Lerer: We will see; well, is he just a storekeeper like this man?

Mr. O'Gara: Just like this man.

Mr. Lerer: He would say the same thing?

Mr. O'Gara: He would say exactly the same thing.

Mr. Lerer: That's Mr. Whittaker?

Mr. O'Gara: Yes.

Mr. Lerer: I will stipulate.

The Court: All right, then the stipulation will be accepted that Whittaker would testify to the same thing. [193]

* * * * *

CARRUTH JOHN WAGNER

recalled as a witness on behalf of the Government,

(Testimony of Carruth John Wagner.)
being previously duly sworn, testified further as follows:

Direct Examination

By Mr. O'Gara:

Mr. O'Gara: There was some question, if the Court will recall, about the picture in Defendant's Exhibit "I", for identification; Defendant's Exhibit "A", in evidence; and Defendant's Exhibit "D", in evidence. All these pictures show pictures of a certain strap.

Mr. O'Gara: Q. Dr. Wagner, will you please examine these pictures (handing exhibits to the witness). Do you know what floor, doctor, Defendant's Exhibit "I", for identification, is?

A. This is taken on the first floor.

Q. By the first floor, do you mean the basement?

A. No, sir; the first floor, that is, the kitchen floor.

Q. Above the basement? A. That is right.

Q. Referring to Government's Exhibit "Q", in evidence, and particularly the strap pictured there, do you know, doctor, whether that strap is the same strap as pictured in "D", Defendant's Exhibit "D" in evidence?

A. It would not appear to be the same strap, no sir.

Q. Referring to Defendant's Exhibit "A" for identification——

The Court: No, "A" is in evidence.

Mr. O'Gara: Q. Pardon me, I meant "I" for

(Testimony of Carruth John Wagner.)

identification, [196] which you have just testified is a picture taken on the first or kitchen floor——

A. Yes, sir.

Q. Do you see there a strap?

A. Yes, sir.

Q. Will you tell us whether that is the same strap?

A. It appears to be the same strap, yes, sir.

Q. And that strap, then, would be the strap at the kitchen floor? A. Kitchen floor.

The Court: Doctor, just a moment; I want to ask you this question: You say it appears to be. Of your own knowledge do you know that they are the same strap?

A. In these two pictures? No, sir, I can't identify this picture of my own knowledge.

The Court: Is that "I"?

Mr. Lerer: That is "A", your Honor.

A. This one I am sure of.

The Court: You are sure of "I" but not of "A"?

A. No, sir. It is from the inside of the elevator and I can't say.

The Court: You wouldn't know what floor that is?

A. Not from my own knowledge. The straps appear identical.

The Court: The appearance of that can be compared by the Court, and counsel can admit it. You don't need this [197] witness to make that comparison.

Mr. O'Gara: Very well, your Honor.

The Court: I want to know from the witness of

(Testimony of Carruth John Wagner.)

his own knowledge if he knows they are the same, and he says they are not.

Mr. Lerer: So I can have a clarification, do I undestand these are the same?

Mr. O'Gara: Yes.

Mr. Lerer: And they are the first floor above the basement?

Mr. O'Gara: Yes, the kitchen floor.

Mr. Lerer: Is that what he testified to?

The Court: No.

Mr. O'Gara: No, that is not what he testified to, but I thought for clarification, there is another witness who will testify to that.

The Court: To get this straight, because we have had considerable conversation here, the witness has testified that Defendant's Exhibit "I" is taken on the kitchen floor above the basement. That is one floor above, is that correct, doctor?

A. That is this one, yes.

The Court: "I"? A. "I".

The Court: That "A", you can't say what floor it is taken [198[on from the photograph itself?

A. No, sir, I can't.

The Court: All right, that is all.

Mr. O'Gara: "Q", your Honor, I think the witness testified is from the inside. Correct.

The Court: Yes, we understand that. [199]

* * * * *

Cross Examination by Mr. Lerer

Q. Doctor, these straps attached to the doors, and I refer specifically to Exhibit "I"—Withdraw that question. Look at Defendant's Exhibit "I", and re-

(Testimony of Carruth John Wagner.)

ferring specifically to the door, does the door ride with the elevator or does that remain on the floor?

A. These doors remain on the floor.

Q. Defendant's Exhibit 'A", was that the picture, doctor, you directed to be taken?

A. Well, I am not sure. I understood—I will have to explain that. I was at surgery when this man came to take these pictures, and as I remember it was around noon, and I came down in the company of another doctor whom I can't recall who he was. He took some pictures on the first floor, and it was my understanding, but I wasn't present, that he went down and took them on the basement floor. [211]

Q. So you would say that this picture I refer to, Exhibit "A", was the picture taken on the basement floor?

A. No, sir; I don't know.

Q. Do you recall that was a Friday that this was taken on the basement floor?

A. I don't recall, no, sir. I recall on my own films because I took them myself, but on these I am not sure.

Q. Which ones are those?

The Court: The colored ones.

A. The ones I took personally, the colored ones.

Mr. Lerer: Q. These colored films, Defendant's Exhibits "B", "C", and "D" were actually taken on the—— A. Basement.

Q. ——basement floor where the accident oc-

Q. Is that taken at the same time? A. Yes.

Q. They were taken at the same time?

A. Yes, sir.

The Court: At the same time? The three pictures were taken at the same time?

Mr. Lerer: Yes.

The Court: You don't mean the same time as "A"?

A. No, these were taken before "A".

Mr. Lerer: Q. Do you remember how long after May 22nd [212] these were taken?

A. After April 22nd?

Q. After April 22nd?

A. No, sir. It was in May.

Q. About a month? A. Less than a month.

Q. Month, two weeks, or three weeks?

A. I couldn't say for sure. I can only give you an estimate, which is of no value.

Mr. Lerer: I think that is all, your Honor. [213]

* * * * *

GERALD J. TRUBOW

Plaintiff herein, recalled, being previously sworn, testified further as follows:

Cross Examination By Mr. O'Gara, Cont'd:

Mr. O'Gara: Mr. Trubow, will you tell us, if you can, why, when you took pictures of the elevator and the premises at the Marine Hospital you did not take a picture of the strap on the basement door?

A. Because I wasn't informed to take any particular pictures of the elevators.

Mr. Lerer: Wait. Will you read that question back, please?

(Question read by the reporter.)

(Testimony of Gerald J. Trubow.)

Mr. Lerer: Did you understand that question?

A. If I understand it correctly, he wants to know why I only [232] took pictures of the outer part of the elevator.

Mr. Lerer: I didn't think you understood it. He said why didn't you take a picture of the strap?

A. Because there wasn't any on the inside.

The Court: Did you hear the answer, Mr. O'Gara?

Mr. O'Gara: I am sorry, I was consulting——

The Court: His counsel informed him the question was why didn't he take a picture of the strap, and his answer was because there wasn't any strap.

Mr. O'Gara: Q. Do you remember the photographer, your friend Mr. Lieberman, I think his name was, who went with you, calling to your attention the existence of a strap?

A. He called my attention that there was just a piece of a strap in the elevator.

Q. Well, Mr. Trubow, why didn't you take a picture?

A. Because my attorney told me not to. He didn't tell me to take any particular kind of picture. He just said, "I would like to have you take pictures in the elevator," which I proceeded to do.

Q. You did not take a picture of the strap?

(Testimony of Gerald J. Trubow.)

A. We didn't take a picture of anything in particular but the elevator. [233]

* * * * *

The Court: Then you are excused at this time, Mr. Trubow.

Witness excused.

The Court: Any further witnesses for your case-in-chief, Mr. Lerer?

Mr. Lerer: We are waiting for Mr. Leiberman, your Honor. We just want to confirm the fact that when he took these pictures, that was the picture, and the broken strap.

Mr. O'Gara: We will stipulate he took the pictures and, I don't know, I suppose he would testify a certain way about the strap.

Mr. Lerer: Well, the stipulation being that there was a strap there inside, but only half an inch long? [236]

Mr. O'Gara: Well, we won't stipulate as to the length of the strap.

The Court: You better bring the witness back in the courtroom until we reach this stipulation, then we will find out whether to call the witness or not.

Mr. Lerer: Perhaps we can stipulate that there was no strap showing?

Mr. O'Gara: No.

The Court: I don't think counsel can stipulate to that.

Mr. O'Gara: I would say I would stipulate that he took the pictures which are in court and he did not take a picture of a strap.

Mr. Lerer: But we don't need a stipulation to that because you have that in evidence.

The Court: Yes. I would say you better proceed with Mr. Lieberman, if you are going to proceed with him. Do you have any witnesses?

* * * * *

ADELBERT E. KELLOG

called as a witness on behalf of the Government, being first duly sworn, testified as follows: [237]

* * * * *

Direct Examination

By Mr. O'Gara:

Q. Mr. Kellog, where do you reside?

A. 431 10th Avenue, San Francisco.

The Court: Will you speak up so that the reporter and counsel can hear you, Mr. Kellog?

A. Yes.

Mr. O'Gara: What is your occupation?

A. Assistant Storekeeper in the United States Marine Hospital.

Q. Were you Assistant Storekeeper there in April, 1949; particularly April 22nd, 1949?

A. I think that is correct.

Q. How long have you been Storekeeper in the Marine Hospital?

A. Oh, some eighteen years, I believe.

Q. And at that time, April 22nd, 1949, who were the people employed in the Storekeeper's Department at the Marine Hospital?

(Testimony of Adelbert E. Kellog.)

A. There is a Mr. Fleming; he was Chief Storekeeper; and myself, and two assistants, Arthur Whittaker and Albert Mitchell.

Q. Mr. Mitchell was here in this court and appeared as a witness? A. That is right.

Q. Mr. Whittaker was called but did not appear?

A. That is correct. [238]

Q. On April 22nd, 1949, was Mr. Fleming present in the storeroom?

A. He was away at the time.

Q. Are you the person next in command of the storeroom? A. That is correct.

Q. You were at that time, too?

A. At that time.

Q. While you were in charge on April 22nd, 1949, in the storeroom of the Marine Hospital, did Gerald Trubow, the plaintiff in this case, come to you in connection with the delivery of certain, or pick-up of certain beds and refrigerators?

A. I never connected that with that date.

Mr. Lerer: What?

The Court: He said he never connected him with that date.

Mr. O'Gara: Q. Do you know Mr. Trubow?

A. I don't know Mr. Trubow.

Q. If I point him out to you as the gentleman sitting in the front row, do you recognize him now?

A. No, I don't recognize him.

Q. On April 22nd, 1949, did any individual, anyone besides Mr. Trubow, approach you and talk to

(Testimony of Adelbert E. Kellog.)

you about refrigerators and beds at the Marine Hospital?

A. No, there was no one came to me at that time.

Q. On the basis of your experience and the practices at the [239] Marine Hospital, will you tell us what was the procedure followed by your storeroom in connection with the delivery of property of that kind, beds and refrigerators, with which we are concerned?

Mr. Lerer: We will object to that, may it please the Court, as being incompetent, irrelevant and immaterial, what the general procedure is.

The Court: Well, I will overrule the objection. He can testify what the custom and practice is.

Mr. O'Gara: Q. What was the practice followed by you in respect to the delivering of this kind of property sold under bid and to be picked up by the purchaser? Tell us exactly how the defendant first enters the picture in connection with the delivery of that property? What did you do?

A. The Supply Officer sends down one of the bids, or I should say the descriptions, bid's descriptions of the articles that are sold, and that is the notification to us that there will be somebody around there to pick these things up if they have—the bids have already gone in and it has been sold, and I am quite sure we had them in the storeroom at that time, on that date.

Q. You are speaking of the beds and refrigerators? A. That is right.

Q. In connection with April 22nd, 1949, did you

(Testimony of Adelbert E. Kellog.)

receive notification from the Supply Officer, Mr. Lewis, in connection [240] with those items?

A. I did.

Q. What part of the day, and what was the form of that notification, and how did Mr. Lewis contact you?

A. If I remember correctly, I believe it was the day before that I received the notification.

Q. How did Mr. Lewis reach you?

A. Well, the messenger delivers the notification to the storeroom.

Q. You say that that was, as you recall, April 21st, 1949? A. That is correct.

Q. Then on April 22nd did you receive any further word?

A. If I remember correctly, I had a telephone message from Mr. Lewis that somebody would be there——

Q. April 22nd?

A. That is correct.—to pick up these articles.

Q. Did someone come to you?

A. I never *say* anybody. Nobody comes to me about it.

Q. When did you first hear of the alleged accident involving Mr. Trubow?

A. Quite possibly two days later.

Q. Two days after the occurrence?

A. After the accident occurred.

Q. Mr. Kellog, in the course of your duties at the Marine Hospital do you use the freight elevator? [241]

(Testimony of Adelbert E. Kellog.)

A. Oh, yes, quite constantly.

Q. During the period from January, 1949, and particularly during the month of April, 1949, did you—and subsequent to April, 1949, did you use the freight elevator at the Marine Hospital?

A. I did.

Q. How frequently did you use it?

A. Pardon.

Q. How frequently did you use it?

A. Well, at least once a day, possibly more.

Q. Will you please examine Government's Exhibit for identification No. "I", paying particular attention to the picture representing the door strap; and will you also examine Defendant's Exhibit "A"? Have you examined those pictures?

A. I have.

Q. Will you tell us what floor is represented by the—on what floor the door represented by Government's Exhibit I, for identification, is?

A. That is what we normally call the kitchen entrance, or the first floor, I would say.

Q. Looking at Defendant's Exhibit "A" have you examined the picture of the strap?

A. I would say that was the same floor.

Q. That is the kitchen, or first floor?

A. That is the kitchen, or first floor. [242]

Mr. Lerer: They are both the same?

A. The best I can tell.

Mr. O'Gara: Q. You say they are both the same?

A. Yes, they are both the same.

(Testimony of Adelbert E. Kellog.)

Mr. O'Gara: At this time, your honor, we offer Government's Exhibit for identification "I" in evidence.

The Court: It will be admitted into evidence.

(Document previously marked Government's Exhibit "I" for identification was admitted into evidence as Government's Exhibit "I".)

Mr. Lerer: May I ask this question: This isn't the particular floor where the accident occurred, is that correct?

Mr. O'Gara: No, but it is offered in evidence only as evidence of the interior of the car, construction of the interior of the car.

Mr. Lerer: But the construction of the interior of the car has nothing to do with the strap because the strap stays on the second floor.

Mr. O'Gara: Yes.

Mr. Lerer: Then why is it being introduced in evidence? You have a picture of the inside of that elevator. We are concerned with the strap.

The Court: It is the same elevator on the floor above. Its probative value can be argued, but it is admitted into evidence. [243]

(Thereupon, photograph previously marked Government's exhibit "A" for identification, was admitted into evidence as Government's Exhibit "A".)

Mr. O'Gara: Q. Look at Defendant's Exhibit "D". Have you examined that picture?

A. I have.

(Testimony of Adelbert E. Kellog.)

Q. You have testified you used the elevator in April, 1949. Did you use the elevator in April, 1949, in the basement; that is, did you use the elevator on the basement floor as well as other floors?

A. That is correct.

Q. Will you tell us whether or not you can identify the picture of the strap shown in Defendant's Exhibit "D"?

A. I believe this is the strap in the basement.——

Mr. Lerer: I am going to object to that.

Mr. O'Gara: Q. Basement door?

A. Yes.

Mr. Lerer: He says he believes. He doesn't say it is. It is a question of opinion.

The Court: The form of the answer he makes is speculative, and therefore I sustain the objection and strike the answer. However, you may interrogate the witness further in order to get an answer in proper form. What we are interested in is not a supposition or belief, but your best recollection and your best opinion. [244]

A. Well, I might say my best opinion would be that I identify that as being the basement strap because, well, the length of it from the other straps on other floors.

Mr. O'Gara: Q. How long was that strap?

A. I should say between eight and ten inches.

Q. When you operate that door, was that the strap on the basement door?

Mr. Lerer: I object to all this line of questions, may it please the Court, upon the ground that it

(Testimony of Adelbert E. Kellog.)

hasn't been established on April 22, 1949, this man was on the elevator and used the strap.

The Court: He says he used it almost once a day.

Mr. Lerer: Yes, almost once a day.

The Court: During April. Counsel, in view of the objection that is made I would suggest that you lay a closer foundation as to whether he used it on that day.

Mr. O'Gara: Yes.

Q. Mr. Kellog, on April 22nd, 1949, were you performing your usual duties?

A. That is correct.

Q. Did your duties take you from the floor on which the storekeeper's office is located to other floors?

A. On that particular day, I have to answer?

The Court: If you can.

Mr. O'Gara: Q. Tell us——

A. Well, I would say yes.

Q. Your best recollection is that you did? [245]

A. That is correct. We get our deliveries every day through that particular elevator.

Q. The storekeeper's office is located on the bottom floor? A. Basement floor.

Q. And you went from that floor to the higher floors?

A. That's right, where I picked up my deliveries.

Q. In going from the basement to the higher floors on April 22nd did you use the freight elevator?

A. I did.

(Testimony of Adelbert E. Kellog.)

Q. Examining Defendant's Exhibit "D", does that photograph refresh your recollection as to what, if any strap, was present in the car, or rather at the basement door of the freight elevator?

A. That is the basement door strap to the elevator, inside of the elevator.

Q. Will you tell us, Mr. Kellog, whether that is the strap, if you recall, which you used on April 22nd in using the elevator and starting from the basement of the Marine Hospital? A. That is.

Q. That is? Do you know, Mr. Kellog, whether or not that strap remained on the basement door of the Marine Hospital freight elevator after April 22nd? Did it continue to be there as best you can recall?

A. I am quite certain it was.

Q. The same strap? [246]

A. That is right.

Q. And was used by you subsequent to April 22nd.

A. (Nodding affirmatively.)

Mr. O'Gara: We have no further questions, your Honor.

The Court: You may cross examine.

Cross Examination

By Mr. Lerer:

Q. Do you remember which day April 22nd, 1949 was—Monday, Tuesday, Wednesday?

A. I can't say.

Q. You don't recall? A. No.

Q. Do you remember anything else that occur-

(Testimony of Adelbert E. Kellog.)

red on April 22, 1949, connected with your job? Do you remember anything about April 22nd, 1949?

A. I do know that the first storekeeper was on his vacation.

Q. For what period of time?

A. I believe it was two weeks.

Q. But I am talking about on April 22nd, 1949. Can you remember anything you did on that particular day? You don't recall, do you?

A. I can't honestly say I recall anything other than that I was very busy.

Q. If there are repairs made to the elevators you wouldn't be informed about it, would you? That is not your department, is that correct? [247]

A. That is correct.

Q. If the repairman came along and put a strap up you wouldn't know about it particularly, would you? They didn't report to you, did they?

A. No, they didn't report to me.

Q. So when you use the elevator daily, as you say, and reach up to pull the strap down, you don't know whether that strap is the same as April 22nd, 23rd, 24th, or whether it was changed or wasn't changed, isn't that correct? You just know there is a strap, is that right? A. There is a strap.

Q. There is nothing about this particular picture as you look at it now which refreshes your memory that this strap was on the door of the basement on April 22nd, 1949, is there?

A. I believe I can remember back there to that

(Testimony of Adelbert E. Kellog.)

time because of the fact that I never heard of the accident until two days afterwards.

Q. All right. What about two days after the accident makes you think that the strap was on—I will withdraw that question. This is the Government's picture, Defendant's Exhibit "C". I show you that. Now, would you compare it with this particular picture, Defendant's Exhibit "D" and let me know if there is any difference between those two pictures as to straps?

A. This picture was taken from the outside. [248]

Q. I am just asking you about the straps?

The Court: He is asking you if there is any difference?

A. I don't see any strap there.

Mr. Lerer: No.

The Court: Referring to Exhibit "C".

Mr. Lerer: Yes.

Q. So that there is no strap there?

A. I don't see any.

Q. So if you were told that when this picture was taken there was no strap there, or the strap was high above so it couldn't be seen, would you say that that was the proper condition of the strap on April 22nd, 1949? Did I make myself clear? In other words, looking at this picture, Defendant's Exhibit "C"?

Mr. O'Gara: Your Honor, I object to the form of the question. The testimony of the witness, and every witness, in respect to this picture "C" is that it doesn't show any strap there.

Mr. Lerer: We all stipulate to that, and the pic-

(Testimony of Adelbert E. Kellog.)

ture speaks for itself. Do I understand arbitrarily somebody who took this picture for the government just held the strap up not to show it?

The Court: That is again argument.

Mr. Lerer: Yes, it is.

The Court: The point is, the question hasn't been [249] completed yet, Mr. O'Gara. Let him ask the question. He asked one and then amplified it, so ask your question and make your objection and we will move along.

Mr. Lerer: Q. April 22nd, 1949, if you were in the elevator on the bottom floor, and the elevator resembled that picture, how would you shut the door in order to have the elevator move up?

A. If I were in the elevator?

Q. Yes.

A. I would have reached up and grabbed the strap that was inside the elevator.

Q. In other words, I take it there can be a strap over and above the lower part of the upper elevator door that doesn't protrude down, is that correct?

A. That isn't shown here.

Q. But that is probably, too, is it not, Mr. Kellog?

A. I don't believe so.

Q. Do I understand all straps on the doors of these elevators are complete and long, ten inches long, is that correct?

A. Well, they are possibly a little longer.

Q. And all straps are longer than ten inches, is that correct?

A. It is quite possible.

(Testimony of Adelbert E. Kellog.)

Q. Well, you are a man that is in these elevators every day [250] and are reaching up and grabbing these straps, are you not?

A. To close the elevator.

Q. And all straps are—Well, you know the lengths of those straps is over ten inches, probably twelve inches long, is that right?

A. Well, I would say they were twelve inches, ten or twelve inches.

Q. And all straps are that length, are they not? That length?

A. I never measured them.

Q. Pardon?

A. I never measured them. I know they have enough there to grab hold of.

Q. Well, Mr. Kellog, you would say when these straps are broken in any respect they are removed and replaced, is that correct?

A. They have been.

Q. Not have been, but are they as a matter of your own knowledge?

A. Well, they never consult me. I am not in that department. They don't tell me about that.

Q. You are not familiar with whether a strap is short, long or broken?

A. I am familiar with the fact that I can—there is enough there to pull on down the elevator. [251]

Q. And sometimes there is just enough, perhaps, for you to grab with your fist and pull down, is that correct?

(Testimony of Adelbert E. Kellog.)

A. No, you don't grab with your fist. You take hold of the strap this way (indicating).

Q. Sometimes the straps are short enough you can't get a hold around and grab them and pull them down, is that correct?

A. I don't think I have ever experienced that in the elevator.

Q. Have you ever had occasion to put your hand underneath here and—referring to Defendant's Exhibit "C"—that is the handle. Have you ever had occasion to put your hand there and pull that door down?

A. Only when I stood outside.

Q. And there are no straps on the outside at all, are there? A. No.

Q. Just inside? I show you Plaintiff's Exhibit 4 and ask you if you can identify that? Can you identify that, Mr. Kellog?

A. That is the piece of an elevator door.

The Court: What is that?

A. The basement—the entrance to the elevator.

The Court: With the doors open?

A. With the fire door open. Just a screen there.

The Court: With the—I see what you mean. Distinguish between the screen door and the metal door when it is closed. [252] A. Yes.

Mr. Lerer: Q. Would you say that represents a true and correct picture of the elevator door and everything connected with the door on April 22nd, 1949?

(Testimony of Adelbert E. Kellog.)

A. That is the screen door. That is not the fire door.

Q. In other words——

A. I would say this is a picture of the screen door closed.

Q. Would you say that is a true and correct picture of what it represents on April 22nd, 1949?

A. I would say so.

Q. Yes. I show you Plaintiff's Exhibit 2 and ask you if you can identify that?

A. This is the basement door of the elevator.

Q. Would you say that represents a true and correct picture of the elevator and all its appurtenances on April 22nd, 1949. With the exception of the figures, of course. The men are excluded from the picture. Would you say that is a correct picture?

A. I would say that was a correct picture.

Q. Thank you. Calling your attention again to your work during April, 1949, what are your hours there, Mr. Kellog?

A. 8:00 o'clock to 4:30.

Q. 8:00 o'clock to 4:30?

A. Half an hour for lunch.

Q. How many men are in your department in the storekeeper's? [253] A. There are four.

Q. Four? A. Yes, sir.

Q. Are there any other people that work on that bottom floor?

A. There are some. I believe one laundryman.

Q. How many people altogether work on that floor besides you four people?

(Testimony of Adelbert E. Kellog.)

A. Two carpenters, the laundryman, and at that time I believe there were just two painters.

Q. How many people had occasion to come downstairs to the basement? Many people come down there at all?

A. Well, I don't see everybody that comes down because my office where I work isn't close to the elevator.

Q. Those refrigerators were moved, weren't they, Mr. Kellog, or are they still there?

A. I didn't see them out there, to the best of my knowledge, two days later.

Q. So two days after the 22nd of April those refrigerators had been moved, is that correct?

A. To the best of my knowledge.

Q. Do you know by whom they were moved?

A. No, I don't.

Q. Did you say something about the beds?

A. No, I didn't.

Q. Did you see the beds there in the storeroom?

A. To the best of my knowledge there were some beds in that shipment, but——

Q. Weren't those removed on the 21st, the day previous to the removal of the refrigerators?

A. I couldn't say honestly. I couldn't honestly say.

Q. Mr. Lerer: Can we take a little recess, your Honor? May we have just a recess for a few minutes? I have never spoken to this next witness.

Mr. O'Gara: May we finish with this witness before recess?

(Testimony of Adelbert E. Kellog.)

Mr. Lerer: I don't know whether I am through. It will just be a few minutes and we can let him go.

The Court: Yes, let's have a short recess of five minutes and then resume. Before we go to recess let me ask a question: You have finished the cross examination of this witness, then Mr. Leiberman, and that is it.

Mr. Lerer: I think so.

The Court: Do you have any further witnesses?

Mr. O'Gara: No.

The Court: All right.

(Thereupon, a short recess was taken.)

Mr. Lerer: Q. Mr. Kellog, here is Defendant's Exhibit "I," and I will ask you to identify which floor that elevator is on, and door?

A. I would say that was the kitchen or first floor. [255]

Q. Why do you identify it as such?

A. The tiling.

Q. Showing you Defendant's exhibit "A," can you tell me which floor that is on, that elevator and door?

A. I would say that was the same floor.

Q. That is the one above the basement?

A. You are inside the elevator looking toward the fire door.

Q. So that would show the floor above the basement?

A. That is correct.

Q. And what is there about this picture which

(Testimony of Adelbert E. Kellog.)

makes you believe that is the second floor, rather, the floor above the basement?

The Court: Again referring to "A"?

Mr. O'Gara: Yes, your Honor.

A. The window here, for one thing.

Mr. Lerer: Q. What about the window?

A. The mark on it, and I think I can see a glass, a wire glass door.

Q. Is that screen and the wire glass door on—— are they on all floors with the exception of the basement?

A. The basement, I believe the fire door has nothing but a screen.

Q. And all other floors have a wire window with a white line across it?

A. That is right. [256]

Q. What is there that differentiates the first floor from the second, third, and the rest of the floors so far as the elevator and doors are concerned?

A. Well, that is the only thing I could tell you, I believe.

Q. So these pictures might be the first, second, third floor?

A. No, it couldn't be the basement.

Q. Excluding the basement, it could be any other floor in the hospital?

The Court: You are talking about "A"?

Mr. Lerer: Yes.

Q. Is that correct, Mr. Kellog?

A. The third floor, I believe, if you were looking out there you could see another little smaller——

(Testimony of Adelbert E. Kellog.)

Q. Let's confine ourselves to Defendant's Exhibit "A". You say that looks like the first floor above the basement? A. Yes.

Q. Because of the mesh glass and white line, which the other floors have just the same, is that right?

A. No, the third floor, the operating room, if I were looking out through I am quite sure I would see another smaller.

Q. No, confine yourself to this picture.

A. I am.

The Court: He is saying if it were at the third floor it wouldn't show that through the window. [257]

A. You wouldn't get a clear view through the window.

Mr. Lerer: Q. Let's eliminate the third floor. What about the other floors?

A. You would on the second floor.

Q. Yes. Sixth floor, fifth floor?

A. We only have the basement and the first floor, the second floor and the third floor.

Q. So by your description this could be the door of the elevator at either the first or second floor?

A. First or second.

Q. But you have testified, have you not, that this is a picture of the first floor, referring to Defendant's Exhibit "A"? You stated that definitely is a picture of the first floor, did you not?

A. I believe I did.

Mr. Lerer: Yes. I think that is all.

The Court: Further direct examination?

(Testimony of Adelbert E. Kellog.)

(Testimony of Adelbert E. Kellog.)

Redirect Examination by Mr. O'Gara:

Q. Mr. Kellog, looking at Exhibit "I," will you please examine the picture of a strap there; and looking at Defendant's Exhibit "A," will you examine the picture in respect to the strap?

Mr. Lerer: What was the question?

The Court: He said to look at them and examine them.

Mr. O'Gara: Q. You have examined them? [258]

A. Yes.

Q. Does your examination refresh your recollection as to whether or not the same strap is pictured in both pictures?

Mr. Lerer: That is the first floor, is it not, counsel, so we get it straight?

Mr. O'Gara: Yes.

Mr. Lerer: That has nothing to do with where the accident occurred?

Mr. O'Gara: That is correct.

A. It looks similar.

Q. (By Mr. O'Gara): Same strap?

The Court: You said it looks similar?

A. Yes.

The Court: By that do you mean it is the same strap? A. Well, they look very much the same.

The Court: Well, from your examination of the two pictures would you say they are pictures of the same elevator strap on the same floor?

A. I would say they were.

The Court: All right.

(Testimony of Adelbert E. Kellog.)

Q. (By Mr. O'Gara): Mr. Kellog, is there a light in that elevator?

A. Yes, there is a light there. There is an electric light.

Q. Do you know whether in April, 1949—April 22nd—there was such a light? [259]

A. I wouldn't say on that particular day, I couldn't remember there being a light. I know there is a light there for the purpose of use of the elevator.

Q. Inside the elevator? A. Inside.

Q. That elevator is a push button elevator so far as the operation of the car is concerned?

A. It is manually operated, inside.

Q. There is a lever to work——

A. That is correct.

Q. ——inside the car? A. Yes.

Mr. O'Gara: No further questions.

Recross-Examination

Q. (By Mr. Lerer): Do you remember when that light was put in the elevator?

A. There has always been a light, to my knowledge, up above the screening of the elevator.

Q. Into the elevator itself, are you sure of that?

A. It shines into the elevator, yes. There is a screen there on top.

Q. Would you say——

A. Just above the screen.

Q. Would you say April 22nd, 1949, there was a light inside of the elevator? Would you testify under oath to that, Mr. Kellog? [260]

A. All I could give you was the fact that there

(Testimony of Adelbert E. Kellog.)

was an electric—I won't say there was a light there, but there was a place for the light.

Mr. Lerer: That is all, Mr. Kellog.

Mr. O'Gara: No further questions.

(Witness excused.)

* * * * *

JESS LIEBERMAN

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lerer): State your name, residence and occupation? A. Jess Lieberman.

Q. You reside in San Francisco, Mr. Lieberman?

A. Yes, sir, I do.

Q. What is your business?

A. My business is scrap metal, and I have an avocation as photography.

Q. April 22nd, 1949, you were in the business of being a scrap metal dealer? A. That is correct.

Q. And you had an avocation of being a photographer? A. Right. [261]

Q. Did you have occasion to take pictures of an elevator and door in the basement of Marine Hospital some time after April 22nd, 1949?

A. Yes, I did.

Q. And about how long after April 22nd?

A. I believe it was about two days after.

Q. I show you Plaintiff's Exhibits 2, 3 and 4, and ask you if you can identify those photographs?

A. They look like the photographs that I took.

(Testimony of Jess Lieberman.)

Q. As a matter of fact, they are the photos that you took, or prints of the photographs you took, is that correct? A. Yes.

The Court: What are the numbers?

Mr. Lerer: 2, 3 and 4, your Honor.

Q. Showing you Plaintiff's Exhibit 2, is that a—does that represent a correct picture as you saw it on that particular day? A. That is right.

Mr. O'Gara: Your Honor, I think——

Mr. Lerer (Interposing): That was what he knows of his own knowledge.

The Court: Overruled. Proceed.

A. That is the way the elevator was.

Q. (By Mr. Lerer): Taking that picture did you see any strap hanging down? [262]

A. There was no evidence of any way of closing the door from the inside.

Q. I show you Plaintiff's Exhibit 4 and ask you if that is a correct picture of the condition of the elevator at the time you saw it at the time—on the occasion that you took the picture?

A. This doesn't look like the same elevator.

Q. Let's get this straight. This Plaintiff's Exhibit 4 is a picture of the door being flush to the top and the bottom part of the door being here. Does that refresh your memory? That was taken by you. And the mesh of the door on the elevator?

A. Oh, yes, I remember this now.

Q. Does that represent the condition of the elevator and door as you saw it on the day the picture was taken?

(Testimony of Jess Lieberman.)

A. With the door—Both doors were open.

The Court: Both metal doors, top and bottom?

A. Yes.

Q. (By Mr. Lerer): Was there any strap protruding at that time? A. I didn't see any.

Q. Did you have occasion to take any pictures of the inside of the elevator?

A. No, I didn't take any pictures of the inside of the elevator. [263]

Q. Why? A. I didn't see any evidence——

Mr. O'Gara: Your Honor, I think that is immaterial.

Mr. Lerer: You asked the question, counsel.

The Court: That is cross-examination.

A. I didn't see any way of closing the door from the inside.

Cross-Examination

Q. (By Mr. O'Gara): Mr. Lieberman, where do you work? A. M. Bercovich, 940 6th Street.

Q. Do you work for Mr. Trubow?

A. I work with him.

Q. How long have you worked with him?

A. I would say about four years.

Q. Where have you worked with Mr. Trubow?

A. M. Bercovich Scrap Metal.

Q. He has been employed there with you four years?

A. He wasn't employed continually during that period.

Q. But he was on the payroll during some of that time?

(Testimony of Jess Lieberman.)

A. He was on the payroll part of the time.

Q. As an employee? A. Right.

Q. Of M. Bercovich? A. Right.

Q. In what capacity?

A. As a buyer and foreman in the yard.

Q. What is your capacity? [264]

Q. Working over or under Mr. Trubow in rank?

A. That is pretty hard to answer. He had his job and I had mine.

Q. Does Mr. Trubow work for you or do you work for Mr. Trubow?

A. Neither. We both work for M. Bercovich.

Q. Who was there first? A. Sir?

Q. Who was there first?

A. Who was there first?

Q. Yes. A. I was.

Q. How much longer before Mr. Trubow came to work? A. About a year, year and a half.

Q. Do you know of any other employment Mr. Trubow has besides that at M. Bercovich's?

A. I don't know of any definitely.

Q. Do you know of any other?

A. I don't follow your question.

Q. Do you know of any other employment Mr. Trubow has besides the employment you have just described? A. You mean at the present time?

Q. During the period January, 1949, to the present time?

A. No. When he was off the payroll he was buying for us on commission. [265]

(Testimony of Jess Lieberman.)

Q. What period of time was he off the payroll and buying on commission?

A. I believe it was from March of 1950 he went off the payroll and came back in October or November.

The Court: You mean March, 1949, don't you?

A. I believe it was, yes, 1949. I am sorry. I am hazy on the date.

Mr. O'Gara: October or November?

A. I believe somewhere around there.

Q. Do you have charge of the preparation of the withholding tax return for M. Bercovich Company?

A. I have.

Q. During the period you have just spoken of did you make a withholding tax return for Mr. Trubow? A. I honestly don't remember.

Q. You could have?

A. Well, I wouldn't say yes or no until I looked at the records.

Q. Since when have you been a photographer?

A. Commercially or as a hobby?

Q. Either.

A. I have been, I guess, twenty-five or thirty years I have been an amateur photographer.

Q. Where are your negatives?

A. They are home. [266]

Q. You didn't bring them to Court? A. No.

Q. You say positively these prints represent the entire negatives?

A. No, I wouldn't say that. They may have been cropped on the edge a little bit.

(Testimony of Jess Lieberman.)

Q. The top and bottom, perhaps?

A. No, not top or bottom.

Q. Are you positive of that? A. Positive.

Q. What conversation did you have in the elevator, or about the premises there regarding the elevator, with Mr. Trubow when you took these pictures?

A. He asked me to come out and take that picture just to show the kind of door they had, and he showed me the door, and I examined it and took the picture that I thought would just show the door in its true sense.

Q. For what purpose?

A. He didn't tell me. He just asked me to take the picture for him.

Q. Isn't it a fact, Mr. Lieberman, he had a bandaged hand at the time the pictures was taken?

A. Yes.

Q. And you didn't know what the pictures were for?

A. I knew he wanted to show where his hand had been caught. [267]

Q. And in that connection did you have a conversation with Mr. Trubow about the operation of the elevator? A. Yes.

Q. You were there to assist Mr. Trubow in getting a picture that would assist this Court in reaching a determination? A. That is right.

Q. About the operation of that elevator by Mr. Trubow?

A. I know I made the remark that I had never

(Testimony of Jess Lieberman.)

seen an elevator door before that you had to close from the outside.

Q. To whom did you make that remark?

A. Mr. Trubow.

Q. You didn't take any picture of the inside of the door? A. No, I didn't. [268]

* * * * *

The Court: Mr. Lieberman, I would like to ask you a question. When you took these photographs who was present besides Mr. Trubow, if anyone?

A. I believe the purchasing agent from the hospital was with us.

The Court: Was he present when you made these remarks about the strap?

A. I believe he was in the vicinity. Whether he overheard the conversation I don't know, but he posed in front of the button to get the elevator on one shot.

Q. (By Mr. O'Gara): Is that the picture of Mr. Lewis? A. I believe that is he.

Mr. O'Gara: That is the gentleman you refer to?

A. That is correct.

The Court: Let me have a look at that photograph. Oh, the man in the suit?

A. That is correct. I believe that was his capacity. I am not sure.

The Court: All right. Any further questions in view of [272] the questions the Court asked?

Mr. Lerer: Just one. At the time you took the picture did you have occasion to look inside the elevator? A. I was inside for a minute, yes.

(Testimony of Jess Lieberman.)

Mr. Lerer: Did you see anything that resembled a strap?

A. If I remember correctly there was a stock of a hanger there where they had a piece, short piece of strap where one had broken off, similar to when your old hanger broke off on the street car.

Mr. Lerer: How long was it in its entirety?

A. I don't think it exceeded an inch.

Mr. Lerer: That is all.

Mr. O'Gara: That is all.

The Court: You are excused.

* * * * *

[Endorsed]: Filed March 6, 1951.

[Endorsed]: No. 12955. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Gerald J. Trubow, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 29, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12955

UNITED STATES OF AMERICA,

Appellant,

vs.

GERALD J. TRUBOW,

Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

The United States of America, Appellant, states that the points on which it intends to rely are as follows:

1. The district court erred in finding that the negligence of the defendant mentioned in the complaint caused plaintiff's injuries.

2. The district court erred in holding the United States liable under the Federal Tort Claims Act when there was no evidence that the accident involved resulted from a negligent or wrongful act on the part of a Government employee.

3. The district court erred in failing to hold that under the Federal Tort Claims Act the United States can not be held liable for breach of any duty at-

taching to the ownership, occupation, possession or control of property, in the absence of any negligent or wrongful act on the part of a Government employee.

4. The district court erred in holding the United States liable for the condition of its elevator where there was no evidence that any defect in the elevator was known to the United States, or any Government employee.

5. The district court erred in failing to make subsidiary findings of fact to support its ultimate conclusion that the United States was liable.

6. The district court erred in failing to hold that the plaintiff was contributorily negligent.

7. The district court erred in rendering judgment for the plaintiff against the United States.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,
Attorney for Appellant.

[Endorsed]: Filed June 12, 1951. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 12955

UNITED STATES OF AMERICA,

vs.

GERALD J. TRUBOW.

MANDATE

United States of America—ss.

The President of the United States of America
To the Honorable, the Judges of the United States District Court for the Northern District of California, Southern Division

Greeting:

Whereas, lately in the United States District Court for the Northern District of California, Southern Division, or before you or some of you, in a cause between Gerald J. Trubow, Plaintiff, and United States of America, Defendant, No. 2907-H, a Judgment was entered on the 30th day of January, 1951, which said Judgment is of record in said cause in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof,

And Whereas, the said defendant appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 19th day of March, in the year of our Lord, one thousand nine hundred and fifty-two, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court with instructions to make a finding upon the issue of contributory negligence; and further to make specific findings of facts in place and instead of the findings of fact by reference to paragraphs of the complaint as appear in the record.

(April 11, 1952.)

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Fred M. Vinson, Chief Justice of the United States, the twelfth day of May, in the year of our Lord one thousand nine hundred and fifty-two.

/s/ PAUL P. O'BRIEN,
Clerk, United States Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed May 12, 1952.

In the United States District Court for the Northern District of California, Southern Division

No. 29077-H

GERALD J. TRUBOW,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been remanded to this Court, with instructions to make further and additional findings and to make more specific findings, and the Court having duly considered the same and having considered the facts and the law now makes the following further and amended

Findings of Fact

I.

It is true that at all times herein mentioned, this action was brought pursuant to the provisions of the Federal Tort Claims Act, effective August 2, 1946, being Title Four, Public Law 601, Chapter 753, 79th Congress, 2nd Session.

II.

It is true that at all times herein mentioned said defendant, United States of America, was the owner and in possession and had control of those certain

premises, together with the buildings and improvements thereon, known and designated as the Marine Hospital, located in the vicinity of 14th Avenue and Lake Street, in the City and County of San Francisco, State of California, hereinafter referred to as said "Marine Hospital"; it is also true that said land and building was known and there used and maintained by the said defendant, United States of America, as a hospital.

III.

It is true that at all times herein mentioned the plaintiff had an agreement with the defendant, United States of America, whereby the said plaintiff could enter upon the premises of said Marine Hospital for the purpose of picking up certain refrigerators and for the removal of same. It is also true that at all times herein mentioned, the plaintiff was on the premises of the said Marine Hospital as a business invitee of the defendant, United States of America.

IV.

It is true that at all times herein mentioned visitors and business invitees were invited and permitted upon the premises of said Marine Hospital and to use the elevator and freight elevator located in said Marine Hospital, hereinafter referred to as said "freight elevator."

V.

It is true that at all times herein mentioned the defendant, United States of America, through its agents, servants and employees, maintained, con-

trolled and operated the said freight elevator which the said visitors and business invitees of said Marine Hospital were invited by the said defendant, United States of America, to use.

VI.

It is true that on or about the 22nd day of April, 1949, at or about the hour of 2:30 o'clock p.m., said plaintiff, as a business invitee, was upon the premises of said Marine Hospital, pursuant to the agreement hereinabove referred to, whereby said plaintiff was to supervise the picking up of certain refrigerators and the removal of same; that in pursuance thereof, it was necessary for the plaintiff to use a certain freight elevator located on the premises of said Marine Hospital; that said freight elevator had bi-parting doors and in order to close said doors, it was necessary to pull the upper door down, the lower door thereupon moving upward to meet said upper door midway; that normally a leather or canvas strap should be attached to the upper door for the purpose of pulling down said door; that said plaintiff was using the said freight elevator with the permission and invitation of the defendant, United States of America; that it was the duty of defendant, United States of America, through its agents and employees, to provide a strap for the purpose of pulling down the upper door of said elevator, as aforesaid; that on the day and at the time hereinabove mentioned, there was but an inch of strap material attached to the upper

door of said elevator, which was wholly inadequate as a strap for the purpose of manipulating said doors, and that there was no utilizable or regular strap thereon; that the defendant, United States of America, through its agents, servants or employees, knew or should have known that the said strap to be used for closing the said elevator doors was missing, and that the said defendant, United States of America, through its agents, servants or employees, failed or omitted to repair or replace said strap, and failed or omitted to warn plaintiff of said defect and danger; that by reason of the said failure to repair or replace or to warn plaintiff, the defendant, United States of America, through its agents, servants or employees, had negligently and carelessly maintained, operated and controlled the said elevator and doors thereof, and that such negligence and carelessness proximately caused plaintiff to sustain an oblique fracture through the distal end of the third metacarpal of the right hand, and to sustain bruises on plaintiff's body, all of which caused plaintiff to suffer intense pain; that the said defect and danger, as aforesaid, was not obvious or apparent to the plaintiff.

VII.

It is true that the injuries sustained by plaintiff are permanent in nature.

VIII.

It is true that the negligent and careless manner in which the defendant, United States of America, through its servants, agents or employees, main-

tained, operated and controlled the said freight elevator and the doors thereof, as aforesaid, constituted the immediate and proximate cause of the injuries received by the plaintiff.

IX.

It is true that by reason of the carelessness and negligence of the defendant, United States of America, as aforesaid, and by reason of the injuries so sustained, said plaintiff has necessarily incurred liability for the services of a physician and surgeon in the sum of One Hundred Ninety-three Dollars and forty-nine cents ($193.49), which sum is a reasonable amount for said services.

X.

It is true that by reason of the carelessness and negligence of the defendant, United States of America, as aforesaid, and by reason of the injuries so sustained, said plaintiff has necessarily incurred liability for X-rays in the sum of Fifteen Dollars ($15.00), which sum is a reasonable amount for said X-rays.

XI.

It is true that said plaintiff was, at the time of said injuries, employed and earning the sum of Four Hundred Dollars ($400.00) per month; that as a result of said injuries, the plaintiff was unable to work for a period of one (1) month, and that by reason of the carelessness and negligence of the defendant, as aforesaid, and by reason of the injuries so sustained, said plaintiff was damaged in the sum of Four Hundred Dollars ($400.00) for

loss of earnings, no part of which nor the whole of said sum has been paid.

XII.

It is true that by reason of the carelessness and negligence of the defendant, United States of America, as aforesaid, and by reason of the injuries so sustained by plaintiff, that plaintiff was further injured in the sum of Two Thousand Dollars ($2,000.00), as and for general damages, no part of which nor the whole of said sum has been paid.

XIII.

It is not true that the injury sustained by the plaintiff herein was proximately caused by the negligence and carelessness of said plaintiff, nor is it true that said plaintiff was himself careless and negligent in and about all the matters complained of in said complaint; it is true that the plaintiff acted as a reasonable, prudent man under similar circumstances would have acted in closing said elevator door.

XIV.

It is not true that the plaintiff had the status of a licensee and came on the premises and into the said elevator for purposes of his own, thereby assuming all of the risks incident to the condition of the premises; it is true that the said plaintiff was a business visitor on said premises.

XV.

It is not true that the defendant, United States of America, owed no duty of care to the plaintiff

in and about all the matters referred to herein; it is true that the defendant, United States of America, owed to the plaintiff the duty of repairing or replacing the defective strap or warning said plaintiff of said danger.

XVI.

It is true that the attorney for the plaintiff is entitled to attorney's fees in the sum of Five Hundred Twenty-one Dollars ($521.00), which sum is not in excess of twenty per cent (20%) of the amount recovered by plaintiff, and which sum is a reasonable attorney's fees.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. Plaintiff is entitled to judgment against the defendant in the sum of Two Thousand Six Hundred Eight Dollars and forty-nine cents ($2,608.49);

2. Attorney for plaintiff is allowed Five Hundred Twenty-one Dollars ($521.00) of the judgment herein, as attorney's fee;

3. Plaintiff is entitled to judgment against the defendant for his costs of suit incurred in this action.

Let judgment for plaintiff be entered accordingly.
Done this 31st day of July, 1952.

/s/ OLIVER J. CARTER,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1952.

In the United States District Court for the Northern District of California, Southern Division

No. 29077-H

GERALD J. TRUBOW,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on January 5, 1951, before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury; Charles O'Gara, Esq., Assistant United States Attorney, appearing on behalf of defendant, and Ben K. Lerer, Esq., appearing on behalf of plaintiff; oral and documentary evidence having been introduced on behalf of both parties; and the Court heretofore having made and caused to be filed herein its Written Findings of Fact and Conclusions of Law, and being fully advised:

Wherefore, by reason of the law and the findings of fact aforesaid, it is Ordered, Adjudged and Decreed that plaintiff have and recover against the defendant in the sum of Two Thousand Six Hundred Eight Dollars and forty-nine cents ($2,608.49); and

It is further Ordered, Adjudged and Decreed that the attorney for plaintiff be and he is allowed Five Hundred Twenty-one Dollars ($521.00) of the judgment herein as attorney's fee; and

It is further Ordered, Adjudged and Decreed that plaintiff have and recover his costs of suit herein from defendant, amounting to the sum of Twelve Dollars and seventy-five cents ($12.75.)

Dated: July 31, 1952.

/s/ OLIVER J. CARTER,
United States District Judge.

Lodged July 17, 1952.

[Endorsed]: Filed July 31, 1952.

Entered August 1, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that the defendant, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment made and entered herein on July 31, 1952, in favor of the above plaintiff.

Dated: September 23, 1952.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ CHARLES ELMER COLLETT,
Assistant United States Attorney, Attorneys for Defendant.

[Endorsed]: Filed September 24, 1952.

[Title of District Court and Cause.]

STIPULATION RELATIVE TO RE-USE OF TRANSCRIPT AND BRIEFS OF FORMER APPEAL

It Is Hereby Stipulated by and between the attorneys for plaintiff and defendant herein as follows:

1. That the transcript of record of the above-entitled matter heretofore used in the United States Court of Appeals for the Ninth Circuit entitled United States of America, Appellant, vs. Gerald J. Trubow, Appellee, Appeal No. 12,955 of said Court, may be used and adopted as part of the record on appeal in the instant matter.

2. The briefs of the appellant and appellee in the appeal heretofore decided in the United States Court of Appeals for the Ninth Circuit entitled United States of America, Appellant, vs. Gerald J. Trubow, Appellee, Appeal No. 12,955 of said Court, may be used as part of the briefs to be submitted by the plaintiff and defendant in the instant appeal.

It Is Further Stipulated by and between the parties hereto that an additional transcript of record shall be printed for the purpose of use in the instant appeal consisting of the order of remand of the Court of Appeals in the prior appeal herein, the findings of fact, conclusions of law and judgment entered into by the above-entitled district court on July 31, 1952, and defendant's notice of appeal, dated September 23, 1952.

It Is Further Stipulated by and between the parties hereto that the plaintiff and defendant

herein shall have the right to file Supplemental Briefs in their behalf in addition to the briefs that have herein been stipulated are to be used in connection with the instant appeal.

Dated: December 9, 1952.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney;

/s/ FREDERICK J. WOELFLEN,
Assistant United States Attorney, Attorneys for Defendant.

/s/ BEN K. LERER,
By /s/ CHARLES O. MORGAN, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed December 10, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the record on appeal as designated by the attorneys for the appellant:

Mandate.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Order extending time to docket appeal, filed Oct. 29, 1952.

Order extending time to docket appeal, filed Dec. 10, 1952.

Stipulation relative to re-use of transcript and briefs of former appeal.

Designation of record on appeal.

Plaintiff's Exhibits 1 to 6.

Defendant's Exhibits A to N.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 11th day of December, 1952.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13654. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Gerald J. Trubow, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 11, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13654

UNITED STATES OF AMERICA,

Appellant,

vs.

GERALD J. TRUBOW,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

The United States of America, Appellant, states that the points on which it intends to rely are as follows:

1. The district court erred in finding that the negligence of the defendant mentioned in the complaint caused plaintiff's injuries.

2. The district court erred in holding the United States liable under the Federal Tort Claims Act when there was no evidence that the accident involved resulted from a negligent or wrongful act on the part of a Government employee.

3. The district court erred in failing to hold that under the Federal Tort Claims Act the United States can not be held liable for breach of any duty attaching to the ownership, occupation, possession or control of property, in the absence of any negligent or wrongful act on the part of a Government employee.

4. The district court erred in holding the United States liable for the condition of its elevator where there was no evidence that any defect in the elevator was known to the United States, or any Government employee.

5. The district court erred in failing to hold that the plaintiff was contributorily negligent.

6. The district court erred in rendering judgment for the plaintiff against the United States.

Dated: December 10, 1952.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,
Attorney for Appellant.

By /s/ FREDERICK J. WOELFLEN,
Assistant United States Attorney, Attorney for Appellant.

Service of copy attached.

[Endorsed]: Filed December 10, 1952.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF RECORD TO BE PRINTED

The United States of America, appellant herein and Gerald J. Trubow, appellee above named, having heretofore entered into a stipulation wherein said parties agreed that the transcript of the record of the above-entitled matter used in the United

States Court of Appeals for the Ninth Circuit entitled United States of America, appellant, vs. Gerald J. Trubow, appellee, Appeal Number 12955 could be used in the docket as a part of the record on appeal in the instant case, and said parties having further agreed that they could supplement said previously used transcript of record for use in the instant appeal.

United States of America, appellant, designates the following parts of the record to be printed in the appeal of the above matter and request that the Clerk print the same:

1. The Order of Remand of the Circuit Court of Appeals in Appeal No. 12955 of the United States Court of Appeals for the Ninth Circuit entitled United States of America, appellant, vs. Gerald J. Trubow, appellee;

2. Findings of Fact and Conclusions of Law and Judgment entered by the United States District Court for the Northern District of California, Southern Division, entered on July 31, 1952;

3. Appellant's Notice of Appeal;

4. Stipulation Relative to Re-Use of Transcript and Briefs of Former Appeal.

CHAUNCEY TRAMUTOLO,
United States Attorney;

/s/ FREDERICK J. WOELFLEN,
Assistant United States Attorney, Attorneys for Appellant.

[Endorsed]: Filed December 19, 1952.

No. 13654

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*

v.

GERALD J. TRUBOW, *Appellee*

Appeal From the United States District Court for the Northern District of California, Southern Division

SUPPLEMENTAL BRIEF FOR APPELLANT

HOLMES BALDRIDGE,
Assistant Attorney General.

CHAUNCEY F. TRAMUTOLO,
United States Attorney.

FREDERICK J. WOELFLEN,
Assistant United States Attorney.

PAUL A. SWEENEY,
MASSILLON M. HEUSER,
MORTON HOLLANDER,
Attorneys,
Department of Justice.

INDEX.

CITATIONS

In the United States Court of Appeals for the Ninth Circuit

No. 13654

UNITED STATES OF AMERICA, *Appellant*

v.

GERALD J. TRUBOW, *Appellee*

Appeal From the United States District Court for the Northern District of California, Southern Division

SUPPLEMENTAL BRIEF FOR APPELLANT

STATEMENT

This action under the Federal Tort Claims Act arises out of personal injuries sustained by appellee while operating a freight elevator in the course of removing surplus goods purchased by him at a Marine hospital in San Francisco. This is the second time this case is before this Court.

The facts in this case are summarized in the brief we filed in Appeal No. 12955, when this case was first

before this Court (R. 158).[1] On that first appeal we advanced three main arguments:

1. The district court's findings of fact, incorporating by reference the general allegations of the complaint and lacking a specific finding as to contributory negligence, were conclusory and too indefinite to support the court's ruling that the United States was liable.

2. There was absolutely no evidence which would justify the entry of the more specific findings essential to a holding that the United States was liable for the allegedly defective condition of the freight elevator. The particular defect alleged was the absence of a suitable strap by which the elevator doors could be closed by plaintiff. We urged that the type of liability imposed on the Government by the district court could rest only on the Government's superior knowledge of the existence of the claimed defect on its premises (pp. 10-13 of our brief in No. 12955). And we showed that the evidence did not support any finding as to actual knowledge of the defect or its continued existence for a period of time long enough to charge the United States with constructive knowledge.

3. In any event, there could be no liability on the part of the United States under the Tort Act because the individual employee allegedly responsible for appellee's injuries was himself under no personal liability to the appellee for those injuries.

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[1] By stipulation filed in this Court, it has been agreed that the briefs in the former appeal may be used as the briefs in the instant appeal and that the parties may file supplemental briefs (R. 158-159).

This Court accepted our first contention and did not pass on the other two arguments. It reversed the district court judgment and remanded the case to the district court with instructions to make a specific finding on the issue of contributory negligence and to make additional specific findings of fact with respect to the other issues instead of basing its findings merely on the general allegations set forth in the complaint (196 F. 2d 161; R. 148).

On remand, the district court reentered judgment against the United States. This time, in conformity with this Court's instructions, the lower court made definite findings of fact. The court found that at the time of the accident the strap used to close the elevator door was torn and inadequate or missing and that the United States "knew or should have known" it "was missing" (R. 152). The court also found that the appellee was not guilty of contributory negligence.

ARGUMENT

We submit that each of the two contentions not passed upon by this Court when the case was first here warrants reversal of the second judgment entered by the district court.

A. The Findings of the District Court Are Not Supported by the Evidence.

The essential finding on which governmental liability was predicated was the actual or constructive knowledge on the part of the United States as to the existence of the defect. Such a finding is no more than an inference or conclusion deduced from the asserted absence of the strap a few days after the accident, and, therefore,

is not entitled to the protection of Rule 52(a) of the Federal Rules of Civil Procedure. That Rule does not "entrench with finality the inferences or conclusions" drawn by the trial court from the facts. *Kuhn* v. *Princess Lida,* 119 F. 2d 704, 705 (C.A. 3); *In re Kellett Aircraft Corp.,* 186 F. 2d 197, 200 (C.A. 3); *St. Louis Union Trust Co.* v. *Finnegan,* 197 F. 2d 565, 568 (C.A. 8).

Moreover, even if such a finding is protected by Rule 52(a), that Rule provides for the setting aside of "clearly erroneous" findings of fact. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.,* 333 U. S. 364, 395.

All of the evidence in this case, when measured against the district court's finding, compels the conclusion that such "a mistake has been committed." Our first brief in this case shows a complete failure to prove any actual knowledge of the defect and a similar failure to prove that the defect had continued for a period of time long enough to charge the Government with constructive knowledge. (pp. 12-13 of our brief in No. 12955)[2]. And no attempt was made by the appellee to supply this proof when the case was again before the court below on remand.

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[2] The record also affirmatively establishes, as we have earlier pointed out at pp. 13-14 of our first brief, that the plaintiff did not exercise reasonable care for his own safety in operating the elevator. For the reasons set forth in detail in that brief, we submit that the judge's finding to the contrary is clearly erroneous.

This failure of proof means that the judgment below cannot stand. A recovery in this case can be justified in California, where this accident occurred, only where it is shown that the landowner had actual knowledge that a dangerous condition existed or that the dangerous condition continued for a sufficiently long period of time to charge him with constructive knowledge. See cases collected at pages 11-12 of our first brief. Recently, Judge Yankwich applied this rule by denying recovery in a similar case in California because "there was no evidence in the record showing" that the dangerous condition had existed for "a sufficient length of time to be noticeable so as to charge the defendant with knowledge" in failing to discover it. *McGregor* v. *Sears, Roebuck & Co.,* 107 F. Supp. 918, 919 (S. D. Cal.).

The rule, of course, is not confined to California. The California cases simply follow "the general rule in this country" under which it must be shown that "the defendant knew, or should have known, of the dangerous condition." *Ernst* v. *Jewel Tea Co.,* 197 F. 2d 881, 884 (C.A. 7). Again, in *Parks* v. *Montgomery Ward Co.,* the Court of Appeals for the Tenth Circuit stressed the fact that "where there was no showing as to how long the condition existed, or whether defendant had actual knowledge of its existence," it was compelled to hold that "plaintiff failed to establish actionable negligence on the part of the defendant." 198 F. 2d 772, 775 (C.A. 10). The failure of proof in the instant case calls for an identical holding here.

B. The Only Type of Liability for Which the Government May Be Held Liable under the Federal Tort Claims Act Is a Respondeat Superior Liability.

The Government, for reasons set forth in our earlier brief, is not in all cases under the Federal Tort Claims Act subject to the landowner's special liability for the defective condition of his premises. Only in those cases where the individual federal employee himself would be under personal liability to the injured plaintiff does the language of the Federal Tort Claims Act allow liability to be imposed on the Government under the *respondeat superior* theory. (See pp. 17-25 of our first brief.) The Court of Appeals for the Fifth Circuit, in emphasizing the correctness of this position, recently noted that "the Act merely subjects the Government to the same liability as the delinquent employee in accordance with the local law." *In Re Texas City Disaster Litigation,* 197 F. 2d 771, 776 (C.A. 5), pending on certiorari, No. 308, 1952 Term, Supreme Court.[3]

Application of that test leaves no room for doubt that the United States cannot be held liable here because the allegedly delinquent employee was himself under no liability to the appellee. Any liability on the em-

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[3] Parts of the opinion in *United States* v. *Hull,* 195 F. 2d 64 (C.A. 1) reject the view that the United States may be held liable under the Tort Claims Act only where the employee is himself liable to the plaintiff. The *Hull* opinion was also adopted by the Third Circuit in *Jackson* v. *United States,* 196 F. 2d 725. But the pertinent language in the *Hull* case is clearly *dicta,* because the court there specifically held that the employee in that case, whose negligence caused plaintiff's injuries, was under an affirmative duty to act with care and to avoid injury to the plaintiff and would presumably be personally liable to the plaintiff for the negligent discharge of that duty.

ployee's part would, of course, be based on negligence in failing to detect the absence of the strap and the failure to supply a new strap. Liability for negligence is, of course, predicated on the failure to use reasonable care in circumstances where it is apparent that such failure will bring about a serious likelihood of injury to the plaintiff. The evidence, however, showed that the freight elevator was not a *public* elevator. To the contrary, its use was ordinarily restricted to hospital personnel, all of whom were familiar with the working of the elevator doors and knew that pulling on the top half of the door would cause the lower half to come up from the floor.

Consequently, even if the inside strap was actually missing, the employee charged with the duty of detecting and repairing that defect could not reasonably be expected to apprehend that his failure to supply a new strap would be likely to cause injury to the users of the elevator. He could reasonably assume that those users, knowing that the two halves of the door met in the center, would not, while inside the elevator, reach out and try to use the outside handle but would have someone close the doors from the outside. Or, he could reasonably assume that if the outside handle were used by someone inside the elevator, that person, knowing the two halves come together, would not pull down the upper half with "full force," as did the appellee (R. 63), but would pull down gradually so as to enable him to get his hand back inside the elevator before the two halves met. In these circumstances, the failure either to detect the absence of the strap or to supply a new

strap does not constitute negligence on the employee's part. We submit that his resulting immunity from any personal liability to the plaintiff prevents imposition of liability on the United States under the Federal Tort Claims Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed with directions to dismiss the complaint and enter judgment for the United States.

HOLMES BALDRIDGE,
Assistant Attorney General.
CHAUNCEY F. TRAMUTOLO,
United States Attorney.
FREDERICK J. WOELFLEN,
Assistant United States Attorney.
PAUL A. SWEENEY,
MASSILLON M. HEUSER,
MORTON HOLLANDER,
Attorneys,
Department of Justice.

JANUARY, 1953.

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No. 13,654

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

GERALD J. TRUBOW,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

SUPPLEMENTAL BRIEF FOR APPELLEE.

BEN K. LERER,
CHARLES O. MORGAN, JR.,
822 Mills Building, San Francisco 4, California,
Attorneys for Appellee.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

No. 13,654

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

GERALD J. TRUBOW,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

SUPPLEMENTAL BRIEF FOR APPELLEE.

STATEMENT.

As stated in appellant's supplemental brief, this is an action arising under the Federal Tort Claims Act for personal injuries sustained by the appellee at the Marine Hospital in San Francisco. Appellee's statement of the facts, which differ somewhat from appellant's can be found in appellee's brief in action No. 12,955, which brief may be used in the present appeal pursuant to stipulation.

It should be noted that on the previous appeal it was the suggestion of this Court that this matter be remanded for a finding on contributory negligence

and, inasmuch as this matter was being remanded, that other specific findings be made by the lower Court. Furthermore, at this prior hearing the Court did listen to the arguments relative to liability under the Act, then remanded the said case.

New findings were made by the District Court and judgment was entered in favor of the plaintiff once again and the Government thereupon appealed from the same.

ARGUMENT.

The appellant has again presented basically two arguments, first, that there was no evidence that the Government had notice of the defect involved in said case and, secondly, that this type of liability does not come within the Federal Tort Claims Act. The first argument, of course, was presented under the theory that the findings of the District Court are not supported by the evidence.

I. FINDINGS OF THE DISTRICT COURT ARE SUPPORTED BY THE EVIDENCE.

The appellant first attacks the findings on actual or constructive knowledge on the part of the United States as to the existence of the defect, as being no more than an inference or conclusion and that, as a consequence, such findings are not entitled to the protection of Rule 52(a) of the Federal Rules of Civil Procedure. It is appellee's contention that the

findings were findings of fact and not an inference or conclusion. The Court heard evidence from which it could find as a matter of fact that the defect was known, or should have been known, by the Government's employees.

Furthermore, it is appellee's contention that the cases cited by the appellant in support thereof are not applicable whatsoever since they go into a question as to whether a certain sum of money, for example, a fee charged, was reasonable, evidence having been produced by both sides as to what was reasonable. This the Court held was not a question of fact but rather an inference or conclusion. However, in the present case it can readily be said that a question of knowledge of a defect is a question of fact.

It is also respectfully submitted that the findings of fact of the lower Court were not contrary to the evidence and clearly erroneous as contended by appellant but, rather, reflect the evidence as actually adduced at the trial and therefore should not be disturbed by the Appellate Court.

Appellant's main argument in its supplemental brief goes to the question as to whether the dangerous condition had existed for a sufficient length of time to be noticeable so as to charge the defendant with knowledge in failing to discover it. The appellant has cited the case of *McGregor v. Sears, Roebuck & Co.,* 107 F. Supp. 918 (S.D.Cal.). However, a closer examination of that case discloses that the facts are not at all similar in that in that case the plaintiff

slipped on what was apparently a combination of waxed paper and a wet floor. The Court, in discussing the case, stated that there was no showing that the paper on the floor or the wet floor had been there long enough to be called to the attention of the defendant and it was doubted that the paper had come from the store. Contrasted with this is the present case where the defendant's employees testified that the elevator was used daily by them and almost exclusively by them, and therefore the defect was, or should have been known to them prior to the accident.

It seems apparent that there was sufficient evidence in this case from which the Court could find as a matter of fact that the United States Government, through its employees, had actual or constructive knowledge of the defect a sufficient time prior to the accident.

II. THE LIABILITY IN THIS CASE COMES WITHIN THE FEDERAL TORT CLAIMS ACT.

The Government once again contends that only in those cases where the individual federal employee himself would be personally liable to the injured plaintiff does the language of the Federal Tort Claims Act allow liability to be imposed upon the Government under the *respondeat superior* theory and, as authority therefor, has cited the case *In re Texas City Disaster Litigation,* 197 Fed. 2d 771. However, a careful reading of that case shows that the Court, in making its decision, came to the conclusion that the

negligent acts of the employees of the Government came within the statutory exceptions to the Act, namely, performing a discretionary function or duty or executing a statute or regulation. It is clear that in the present case there is no claim whatsoever as to any exemptions. Instead, the appellant contends that the present type of liability does not come within the Act.

It is appellee's opinion that the case of *U. S. v. Hull,* 195 Fed. 2d 64 (C.A. 1), meets this specific problem directly. In that case the plaintiff was injured by a defective window in a post office which fell down on her hand as she placed her hand through the window to acquire some stamps. The lower Court held for the plaintiff and the United States, the defendant, appealed, one of the bases for appeal being that under the Federal Tort Claims Act, the United States can be held liable *only* where some employee himself is legally liable to the person injured and that, though an agent or servant of the landowner would be subject to liability for negligently creating a dangerous condition on the premises likely to injure a third person, yet where there was no finding of specific misfeasance and assuming the retaining mechanism was defective and some Government employee was under a duty to inspect and repair it, his nonfeasance in failing to repair the allegedly defective window constituted a breach of duty owed by him to the United States but not to appellant. The Court at page 67, in stating its opinion, actually was also stating appellee's argument in the present case:

> "To argue as appellant does that the United States would be liable only if some government employee were guilty of misfeasance ignores the phrase 'or omission' occurring twice in the statutory language."

Further quoting the Court in the *Hull* case, it stated:

> "But 28 U.S.C. Sec. 1346(b) does not say that the United States is liable in tort only where the employee himself is legally liable to the person injured. In effect, the United States argues for an interpretation of the latter part of the section as though it read '* * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant (and where the employee would also be liable to the claimant) in accordance with the law of the place where the act or omission occurred * * * an unwarranted interpolation."

It should also be noted further, in support of appellee's argument, that the Court, in discussing the question of misfeasance and nonfeasance, did state that in the case of an employee who has undertaken the job of inspecting and repairing portions of business premises which, if allowed to fall in disrepair, are likely to cause injury to business invitees and if the employee negligently fails to perform such duties as a result of which foreseeable injury results to a business invitee, *then there is more than mere nonfeasance* and, since reliance has been induced by the employee, the law of tort imposes upon him an

affirmative duty to business invitees to use care to perform his undertaking.

Also, in the Third Circuit, the *Hull* case was followed in the case of *Jackson v. U. S.,* 196 Fed. 2d 725. In that case the plaintiff suffered injuries while descending the steps of a post office at night and the Court stated:

> "The maintenence of post office property in an unreasonably dangerous condition is just as much the negligent omission of an employee of the government as is the failure to heed a stop sign by a driver of a mail truck."

It would seem that from the foregoing cases and the cases previously cited in appellee's other brief that the Courts throughout the country are in accord that the type of liability involved in this case comes within the statutory words "* * * negligent or wrongful act or omission of any employee of the Gvoernment * * *"

CONCLUSION.

It is respectfully submitted that the judgment below should be affirmed and that appellant's appeal on file herein be denied.

Dated, San Francisco, California,
March 6, 1953.

BEN K. LERER,
CHARLES O. MORGAN, JR.,
Attorneys for Appellee.

No. 13660

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MURIEL H. REHRIG, doing business as Rehrig-Pacific Company,

Respondent.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 372, inclusive)

Petition for Enforcement of Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13660

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

GENERAL COUNSEL'S EXHIBIT No. 1-A

Form NLRB-501 (12-49)

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No. 21-CA-1053. Date filed 3/5/51. Compliance Status checked by: D. B.

Important—Read Carefully: Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with sections 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and four copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer against whom charge is brought: Rehrig-Pacific Company, 3726 East 26th Street, Los Angeles, Calif.

Number of workers employed: 69.

Nature of employer's business: Manufacture of Metal Bound Milk Crates.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) and (3) of the National Labor Relations Act, and these

unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the charge:

That on February 22, 1951 at 3:15 p.m. on company time and property, and on two previous occasions to my knowledge, Bud Rehrig, the owner and general manager of the company, did call a meeting of all his employees, at which time he made statements promising reward if they voted "no union", and also threatening loss of work and possible closing down of the plant if they did vote for the union. At the February 22nd meeting he did specifically tell the employees that even if they voted for the union that wages were frozen, but that he would give them the 10% allowable if they voted "no union", and further promised them that if they voted "no union" he would set aside 25% of the profits of the Company which he would pay to them in a form of a bonus, putting it into escrow for them. At other meetings of the employees on company time and property statements were made by Mr. Rehrig and other representatives of the Company that if they went "union" they would lose their overtime, and he might have to cut down work to three days a week or, if forced to pay the union scale of wages, he might have to shut down the plant completely.

On or about January 31, 1951, the employer, by and through his officers, agents and employees, did refuse, and continuously has refused to bargain collectively with the undersigned labor organization,

the duly designated representative of a majority of the employees of said employer.

3. Full name of labor organization, including local name and number, or person filing charge: Woodworkers Local 530.

4. Address: 538 Maple Avenue, Los Angeles 13, California. Telephone No. MA 2188.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit: United Brotherhood of Carpenters & Joiners of America, AFL.

6. Address of national or international: Indianapolis, Indiana.

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: February 28, 1951.

/s/ By R. R. McKINZIE,
Business Representative

Affidavit of Service by Mail attached.

GENERAL COUNSEL'S EXHIBIT No. 1-C

United States of America
Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-1053

In the Matter of

REHRIG-PACIFIC COMPANY
and
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, WOODWORKERS LOCAL 530, AFL.

COMPLAINT

It having been charged by Woodworkers Local 530, United Brotherhood of Carpenters and Joiners of America, AFL, hereinafter called the Union, that Rehrig-Pacific Company, hereinafter called Respondent, has engaged in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, Public Law 101-80th Congress, First Session, hereinafter called the Act, and the General Counsel of the National Labor Relations Board on behalf of the Board, by the Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, Section 102.15, hereby issues this Complaint and alleges as follows:

1. Respondent is an individual, Muriel H. Rehrig, doing business under the duly registered ficti-

tious name, Rehrig-Pacific Company. Respondent owns and operates a plant in Los Angeles, California, where it is engaged in the manufacture, sale and distribution of milk crates. Products of Respondent's Los Angeles plant, valued at approximately $200,000 annually are shipped to points located outside the State of California.

2. Respondent is, and at all times material herein has been, engaged in commerce within the meaning of the Act.

3. Woodworkers Local 530, United Brotherhood of Carpenters and Joiners of America, A. F. of L., is a labor organization within the meaning of Section 2, subsection (5), of the Act.

4. A unit for the purposes of collective bargaining, composed of all production and maintenance employees; excluding office and clerical employees, watchmen, guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended, would insure to Respondent's employees the full benefit of the right to self-organization and otherwise effectuate the policies of the Act and is therefore a unit appropriate for the purposes of collective bargaining.

5. Prior to January 31, 1951, and at all times material herein, a majority of Respondent's employees in the unit set forth in paragraph 4 above, did designate the Union as their representative for the purposes of collective bargaining. By virtue of the aforesaid designation, the Union is, and at all times since January 30, 1951, has been the exclusive collective bargaining representative of the em-

ployees in the unit set forth in paragraph 4 above, for the purposes of collective bargaining with respect to rates of pay, wages, hours of work and other conditions of employment.

6. Respondent, while engaged in business as described above, on or about January 31, 1951, and at all times thereafter, refused and failed, and does now refuse and fail, to bargain collectively in good faith with respect to rates of pay, wages, hours of work and other conditions of employment with the Union as the exclusive representative of all employees in the unit set forth in paragraph 4 above; and by such acts, and by each of them, did engage in and is now engaging in unfair labor practices within the meaning of Section 8 (a), subsection (5) of the Act.

7. Respondent, by its officers, agents, and employees, including without limitation, B. H. Rehrig, manager, and Gill Bard, superintendent, in the plant on various dates in February, 1951, has interfered with, restrained, and coerced its employees, and is interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act by various acts and statements, including but not limited to the following:

(a). Interrogating its employees with regard to their Union membership, activities, and sympathies;

(b). Threatening to shut down the plant for several days each week should Respondent be compelled to recognize the Union;

(c). Threatening to reduce the working force

should Employer be compelled to recognize the Union;

(d). Suggesting the formation of a company Union as an alternative to recognizing the Union;

(e). Promising to reward its employees with a bonus if they should vote against Union representation;

(f). Rewarding its employees for voting against Union representation by instituting a bonus plan.

8. Respondent, by its acts and each of them as set forth in paragraphs 6 and 7 above, did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8 (a), subsection (1) of the Act.

9. The acts and conduct of Respondent as set forth in paragraphs 6, 7, and 8 above, occurring in connection with the operation of Respondent's business, as set forth in paragraphs 1 and 2 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

10. The aforesaid acts of Respondent and each of them as set forth in paragraphs 6, 7, and 8 above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections

(1) and (5), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, this 15th day of June, 1951, issues this Complaint against Rehrig-Pacific Company, Respondent herein.

[Seal] /s/ HOWARD F. LeBARON,
Regional Director, National Labor Relations Board, Twenty-First Region.

Affidavit of Service by Mail attached.

GENERAL COUNSEL'S EXHIBIT No. 1-F

[Title of Cause.]

ANSWER TO COMPLAINT

Comes now Rehrig-Pacific Company, respondent in the above entitled matter, and in answer to the complaint herein, denies and alleges as follows, to-wit:

1. Answering paragraphs 5, 7, 8 and 10 of the complaint herein, respondent denies each and every allegation therein contained, both generally and specifically.

2. Answering paragraph 6 of the complaint, respondent admits that it refused to bargain collectively with the Union and alleges that said Union was not and is not the exclusive representative of all the employees in the unit set forth in paragraph 4 of the complaint, and further denies that by such acts or in any other manner did the respondent engage in nor is it now engaging in any unfair labor practices within the meaning of Section 8(a), subsection (5) of the Act, or in any other way or at all.

3. Respondent affirmatively alleges that the Union and the National Labor Relations Board, recognizing that there was a dispute as to the representative of the employees, did by petition and consent procure the holding of an election, which said election terminated in a disavowal of the Union as the representative of the employees. That there-

after a petition was again filed by the Union requesting that a further election be held upon grounds therein set forth; that respondent is willing to and does hereby consent to the holding of such further election at such time and under such procedures as may be set forth by the National Labor Relations Board; that without the consent or knowledge of the respondent, said latter petition was withdrawn. That the proper procedure to determine who is the exclusive bargaining agent of the employees is by way of an election, all of which is well known to the Union and the National Labor Relations Board.

Wherefore, the respondent prays that no action be taken under said complaint and that the same be dismissed.

/s/ JOE ORLOFF,
Attorney for Respondent,
Rehrig-Pacific Company.

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 3

[Letterhead of Woodworkers]

Rehrig-Pacific Company January 31, 1951
3726 East 26th St., Los Angeles, Calif.

Attention: Mr. Bud Rehrig.

Dear Sir:

This is to officially inform you that a majority

of your production and maintenance employees of your plant at 3726 E. 26th St. L. A. have authorized our Organization to bargain collectively for wage hours and other working conditions for them.

We will be happy to meet with you on this matter at your earliest convenience.

Sincerely yours,

/s/ R. R. McKINZIE,
Business Repres.

CC—21st Reg. N.L.R.B., 111 W. 7th St. L. A.
RRM:FS

GENERAL COUNSEL'S EXHIBIT No. 4

Rehrig-Pacific Company

	Name	Rate of Pay per hr.
1.	Edward Baca	$1.10
2.	Tony B. Garfio	1.10
3.	Tomas Echavarria	1.20
4.	Antonio Madrid	1.15
5.	Willie Woods	1.10
6.	Frank L. Marquez	1.05
7.	Armando Benitz	1.05
8.	Gerardo Martinez	1.20
9.	Domingo Delgado	1.15
10.	Richard Valverde	1.15
11.	Louis C. Lemos	1.00
12.	George Torres	1.05
13.	P. Jesus Magana	1.00
14.	Joe S. Rivera	1.05
15.	Rafael de Velasco	1.05
16.	Raul Sousa	1.20

	Name	Rate of Pay per hr.
17.	Enrique Giesman	1.00
18.	Frank Banneloz	1.00
19.	Jose Valincio	1.05
20.	Carlos Taylor	1.30
21.	Jose Gonzalez	1.25
22.	Francis Rivera Yburn	1.05
23.	Agirrlin Ortega	1.25
24.	Florentino Chavarria	1.15
25.	Eduardo Sanchez Cervonts	1.15
26.	Jose Lopez	1.05
27.	Carlos Arraya	1.25
28.	Mike Morga	1.00
29.	Raul Magana	1.15
30.	Trinidad Marquez	1.20
31.	Jose Verdugo	1.00
32.	Alexandro Baldezama	1.10
33.	Angel Hernandez	1.05
34.	Tim Patterson	1.20
35.	C. L. Coffey	1.20
36.	Ray McConnell	1.25
37.	Simon McAfee	1.20
38.	F. F. Tilly	1.10
39.	W. Thomas	1.20
40.	Henry Gorman, Jr.	1.25
41.	Luke Gagliamo	1.15
42.	Alberto Arroyos	1.15
43.	John Gagecano	1.25
44.	Louis Garcia	1.05
45.	Thomas R. Sanchez III	1.05
46.	Romiro Lopez	1.05

GENERAL COUNSEL'S EXHIBIT No. 6

Form NLRB-502 (8-49)

United States of America
National Labor Relations Board

PETITION

Case No. 21-RC-1790. Date filed 2/5/51. Compliance Status checked by D. B.

Important—Read Carefully: When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act. * * * * *

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition:

A. [xx] RC—Certification of Representatives (Individual, Group, Labor Organization) —A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to Section 9 (a) and (c) of the act.

* * * * *

2. Name of employer: Rehrig-Pacific Company.

3. Address of establishment involved: 3726 E. 26th Street, Los Angeles, California.

4. Nature of employer's business: Manufacturing of crates and boxes.

5. Description of unit involved: Included—All production and maintenance employees. Excluded—All supervisors.

6a. Number of employees in unit: 70.

6b. Number of employees supporting this petition: 46.

7a. [ ] Request for recognition as Bargaining Representative was made on January 31, 1951, and Employer declined recognition on or about February 5, 1951.

8. Recognized or Certified Bargaining Agent: None.

* * * * *

11. Parties or organizations which have claimed recognition as representatives: Woodworkers Local 530, I.B. of C.J. & W. of A., A.F.L., 538 Maple Avenue, Los Angeles, California. Date of claim: January 31, 1951.

* * * * *

13. I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Petitioner: Woodworkers Local 530, I.B. of C.J. & W. of A.

Affiliation: A.F.L.

/s/ By R. R. McKENZIE
Business Representative

Address: 538 Maple Avenue, Los Angeles 13, California. MAdison 2188.

GENERAL COUNSEL'S EXHIBIT No. 7

United States of America
National Labor Relations Board

AGREEMENT FOR CONSENT ELECTION

Pursuant to a Petition duly filed under Section 9 of the National Labor Relations Act as amended, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), the undersigned parties hereby waive a hearing and agree that an election by secret ballot is to be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine the proposition checked below. (Check appropriate box.)

[x] Representation Election: Whether or not such employees desire to be represented for the purpose of collective bargaining by (one of) the undersigned labor organization(s).

[ ] Union Shop Election: Whether or not such employees desire to authorize the undersigned Union, which is their present collective bar-

gaining representative, to make an agreement with the undersigned Employer requiring membership in such Union as a condition of continued employment.

The Parties Hereby Further Agree as Follows:

1. Election.—Such election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

2. Eligible Voters.—The eligible voters shall be those employees included within the Unit described below, who appear on the Employer's payroll for the period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the Armed Forces of the United States who present themselves in person at the polls, but excluding any employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election and any employees on strike who are not entitled to reinstatement. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

3. Notices of Election.—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The Employer, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. Observers.—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

5. Tally of Ballots.—As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to each of the parties. When appropriate, the Regional Director shall issue to the parties a certification of representatives or certificate of results of election, as may be indicated.

6. Objections, Challenges, Reports Thereon.—Objections to the conduct of the election or conduct affecting the results of the election, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Bal-

lots. Copies of such objections must be served upon the other parties at the time of filing with the Regional Director. The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon. The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.

7. Run-Off Procedure.—In the event more than one labor organization is signatory to this agreement, and in the event that no choice on the ballot in the election receives a majority of the valid ballots cast, the Regional Director shall proceed in accordance with Section 203.62 of the Board's Rules and Regulations.

8. Commerce.—The Employer is engaged in commerce within the meaning of Section 2 (6) (7) of the National Labor Relations Act.

9. Wording on the Ballot.—Only the choice below marked "X" is pertinent to this agreement.

Representation Election:

[xx] In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot:

First	Second	Third	Fourth
.....	.....	.....	.....

Where only one labor organization is signatory to this agreement, the name of the organization shall appear on the ballot and the choice shall be "Yes" or "No."

Union Shop Election:

[ ] Do you wish to authorize the union which is your present collective bargaining representative to enter into an agreement with your employer which requires membership in such union as a condition of continued employment?

10. Payroll Period for Eligibility.—Payroll period ending February 14, 1951.

11. Date, Hours, and Place of Election.—Date: February 23, 1951. Hours: From 3:15 to 3:45 P.M. Place: Company Plant.

12. The Appropriate Collective Bargaining Unit.—Included: All production and maintenance employees. Excluded: All other employees including office and clerical employees, watchmen; guards,

professional employees and supervisors as defined in the National Labor Relations Act, as amended.

WOODWORKERS LOCAL 530, I. B.
of C. J. & W. of A., AFL,
(Petitioner),

/s/ By R. R. McKENZIE,
Business Representative.

REHRIG PACIFIC COMPANY,

/s/ By B. H. REHRIG,
Mgr.

Date executed February 13, 1951.

Recommended: H. C. Bumgarner, Field Examiner, National Relations Board.

Date approved 2-13-51. Howard F. LeBaron, Regional Director, National Labor Relations Board.

Case No. 21-RC-1790.

GENERAL COUNSEL'S EXHIBIT No. 8

United States of America
National Labor Relations Board

NOTICE OF ELECTION

Rights of Employees

Under Section 7 of the National Labor Relations Act, employees have the right to self-organization; to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in concerted activities, for the purpose of collective bargaining or other

mutual aid or protection, and shall also have the right to refrain from any or all such activities.

Purpose of Election

An election by secret ballot will be conducted, under the supervision of the Regional Director of the National Labor Relations Board, among the eligible voters described herein, to determine the representative, if any, desired by them for the purpose of collective bargaining with their employer.

Secret Ballot

The election will be by Secret ballot. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to the Regional Director or his agent in charge of the election. Your attention is called to Section 12 of the National Labor Relations Act:

Any Person Who Shall Willfully Resist, Prevent, Impede or Interfere With Any Member of the Board or Any of Its Agents or Agencies in the Performance of Duties Pursuant to This Act Shall Be Punished by a Fine of Not More Than $5,000 or by Imprisonment for Not More Than One Year, or Both.

An agent of the Board will hand a ballot to each eligible voter at the voting place. The voter will then mark his ballot in secret in a voting booth and fold it. The voter will then personally deposit the folded ballot in a ballot box under the supervision of an agent of the Board. A majority of the valid

ballots cast will determine the results of the election.

Incorporated herein, for your information only, is a copy of the official ballot.

Authorized Observers

Each of the interested parties may designate an equal number of observers, this number to be determined by the Regional Director or his agent in charge of the election. These observers will (a) act as checkers at the voting place and at the counting of ballots, (b) assist in the identification of voters, (c) challenge voters and ballots, and (d) otherwise assist the Regional Director or his agent.

Eligibility Rules

Employees described under Voting Unit in this Notice of Election who did not work during the designated pay-roll period because they were ill or on vacation or temporarily laid off shall be eligible to vote. Employees who have quit or been discharged for cause since the designated pay-roll period, and have not been rehired or reinstated prior to the date of the election, and any employees on strike who are not entitled to reinstatement shall not be eligible to vote.

Challenge of Voters

The challenge of a voter Must be made before the voter has deposited his ballot in the ballot box.

Information Concerning Election

Any employee who desires to obtain any further information concerning the terms and conditions under which this election is to be held or who de-

sires to raise any question concerning the holding of an election, the voting unit, or eligibility rules may do so by communicating with the Regional Director or his agent in charge of the election.

Voting Unit

Included: All production and maintenance employees, who were in the employ of the Employer during the pay-roll period ending February 14, 1941.

Excluded: All other employees including office and clerical employees, watchmen; guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

Employees in the Armed Forces who appear at the polls are eligible to vote.

Time and Place of Election:

Date: Friday, February 23, 1951.

Time: From 3:15 p.m. to 3:45 p.m.

Place: Company's Plant.

Sample

United States of America
National Labor Relations Board

OFFICIAL SECRET BALLOT

For Employees of Rehrig Pacific Company

This ballot is to determine the collective bargaining representative, if any, for the unit in which you are employed.

If you spoil this ballot return it to the Board Agent for a new one.

Mark an "X" in the Square of Your Choice.

Do you wish to be represented for purposes of collective bargaining by—Woodworkers Local 530, I. B. of C. J. & W. of A., AFL.: [ ] Yes. [ ] No.

Do Not Sign This Ballot. Fold and drop in ballot box.

HOWARD F. LeBARON,
Regional Director.

This is the only official notice of this election and must not be defaced by anyone.

GENERAL COUNSEL'S EXHIBIT No. 9

United States of America
National Labor Relations Board

CERTIFICATION ON CONDUCT OF ELECTION

Name of employer: Rehrig Pacific Company.

Case No. 21-RC-1790.

Date of election: February 23, 1951. Place: Los Angeles, California.

The undersigned acted as agents of the Regional Director and as authorized observers, respectively, in the conduct of the balloting at the above time and place.

We Hereby Certify that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

For the Regional Director, 21st Region:

/s/ H. C. BUMGARNER,

For the Rehrig Pacific Company:

/s/ CARLOS TAYLOR,

For Woodworkers Local 530, I. B. of C. J. & W. of A., AFL:

/s/ EDWARD BACA.

GENERAL COUNSEL'S EXHIBIT No. 10

[Title of Cause.]

TALLY OF BALLOTS

Date issued: February 23, 1951. Type of election: Consent.

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters.... 62
2. Void ballots 0
3. Votes cast for Woodworkers Local 530, I. B. of C. J. & W. of A., AFL..... 26
4. Votes cast for ..... —
5. Votes cast for ..... —
6. Votes cast against participating labor organization(s) 33
7. Valid votes counted (sum of 3, 4, 5, and 6) 59
8. Challenged ballots 2
9. Valid votes counted plus challenged ballots (sum of 7 and 8) 61
10. Challenges are (not) sufficient in number to affect the result of the election.
11. A majority of the valid votes has (not) been cast for Woodworkers Local 530, I. B. of C. J. & W. of A., AFL.

For the Regional Director:

/s/ H. C. BUMGARNER

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For Woodworkers Local 530, I. B. of C. J. & W. of A., AFL:

/s/ EDWARD BACA

For Rehrig Pacific Company:

/s/ CARLOS TAYLOR.

GENERAL COUNSEL'S EXHIBIT No. 11

[Title of Board and Cause.]

OBJECTIONS TO CONDUCT AFFECTING THE OUTCOME OF ELECTION

Comes now Woodworkers Local No. 530, United Brotherhood of Carpenters and Joiners of America, AFL, and files these objections to conduct affecting the outcome of election, and as reason therefor shows the following:

I.

An election was held among the employees of the above mentioned employer on February 23, 1951, in the unit agreed upon between the parties.

II.

The Company, acting through its officers, agents

and employees, did affect the outcome of the election in the following manner:

A meeting was called on the 22nd of February, 1951, at 3:15 P.M. on company time and on company property, at which time Mr. Bud Rehrig, General Manager and Owner, addressed the employees as follows: He started out by saying that if they voted to join a union it was alright with him, but that if they did so they could not get any more money anyway because wages were frozen under the Wage Stabilization Orders, some of which he read to them. He further stated that under present orders a ten percent increase was allowed, and that he would give them that anyway if they voted "no union". He also stated that he intended to put in a bonus system, under which arrangement he would divide 25% of the profits of the business and put the money into escrow for them if they voted "no union".

III.

Further, it has just come to the attention of Woodworkers Local 530 that the employer had also called two other meetings on company time and on company property after the election was announced and previous to the meeting on the 23rd of February, at which meetings either the employer or his superintendent addressed the employees and at which meetings various statements were made by responsible officers of the company offering reward for voting "no union" or penalties, such as losing overtime if they voted for the union, and also stating that they might have to cut down work to three

days a week if they went "union", and that if the employer was forced to pay union scale he might have to shut up the plant completely.

Wherefore, the company having committed conduct which prevented the free and untrammelled choice of the employees, it is prayed that the election be set aside.

WOODWORKERS LOCAL 530, United Brotherhood of Carpenters and Joiners of America, AFL,

/s/ By R. R. McKINZIE,
Business Representative.

Duly Verified.

Affidavit of Service by Mail attached.

GENERAL COUNSEL'S EXHIBIT No. 12

[Title of Board and Cause.]

REPORT ON OBJECTIONS

Pursuant to an Agreement for Consent Election executed February 13, 1951, by and between the Rehrig Pacific Company, hereinafter called the Employer, and Woodworkers Local 530, International Brotherhood of Carpenters, Joiners and Woodworkers of America, A. F. of L., hereinafter called the Petitioner, an election in this matter was conducted on February 23, 1951.

The results of the election, set forth in a Tally of Ballots and served upon the parties on that date, were as follows:

Approximate number of eligible voters	62
Void ballots	0
Votes cast for Petitioner	26
Votes cast against Petitioner	33
Valid votes counted	59
Challenged ballots	2
Valid votes counted plus challenged ballots	61

On February 28, 1951, the Petitioner filed timely Objections to Conduct Affecting Outcome of Election, hereinafter referred to as the Objections. The Objections contained an Affidavit of Service by Mail upon the Employer on February 28, 1951.

Pursuant to Article 6 of the Consent Election Agreement and Sections 102.54 and 102.61 of the National Labor Relations Board Rules and Regulations, Series 6, the undersigned has investigated said Objections and issues his report thereon.

On February 22, 1951, at approximately 3:15 P.M., a meeting of the employees was held by the Employer at the Company plant, and on Company time. This meeting was held the day before the election held in this case. At this meeting, B. H. Rehrig, President of the Company, addressed the employees. Mr. Rehrig told the employees, inter alia, that he had no objections to their having a union, but that he wished they would try his plan first. His plan was a bonus system in which the Company would set aside 25 percent of the Company's profits to be divided among the employees. Investigation has revealed that such a bonus plan was actually effectuated by the Company after the election. Mr. Rehrig in making said statements regarding payment

of the bonus effectively led the employees to believe that the bonus would be paid only if the Petitioner lost the election. In addition to his statements regarding payment of a bonus, Mr. Rehrig also told his employees that if the Petitioner won the election it might be necessary, because of living up to union demands, to reduce the number of employees and number of hours worked.

In view of the above, the undersigned finds the Employer interfered with the employees' right to a free and untrammelled election, and it is therefore ordered that the election held in this case on February 13, 1951, be set aside, and the results thereof voided.

Dated at Los Angeles, California this 24th day of May, 1951.

/s/ HOWARD F. LeBARON,
Regional Director, National Labor Relations Board, Twenty-First Region.

Affidavit of Service by Mail attached.

GENERAL COUNSEL'S EXHIBIT No. 15

National Labor Relations Board
Twenty-First Region, 111 West Seventh St.,
Los Angeles, California

June 20, 1951

Rehrig-Pacific Company
3726 E. 26th St.
Los Angeles, California

Re: Case No. 21-RC-1790

Gentlemen:

This is to advise you that the petition in the above matter, with my approval, has been withdrawn without prejudice.

Very truly yours,

/s/ HOWARD F. LeBARON,
Regional Director.

cc: Woodworkers Local 530, Int'l Bro. of Carp. & Joiners of Am., AFL, 538 Maple Avenue, Los Angeles 13, California.

GENERAL COUNSEL'S EXHIBIT No. 20

Form NLRB-501 (12-49)

United States of America
National Labor Relations Board

AMENDMENT TO CHARGE AGAINST EMPLOYER

Case No. 21-CA-1053.

* * * * *

1. Employer against whom charge is brought: Muriel H. Rehrig dba Rehrig Pacific Company, 3726 E. 26th St., Los Angeles, Calif.

Number of workers employed: 69.

Nature of employer's business: Manufacturer of metal bound milk crates.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the charge:

The employer, throughout the past six months, and continuously during said period has dominated and interfered with the formation and administration of a labor organization and contributed financial and other support to it, to-wit: Rehrig Employees Benefit Group, 536 South Arizona, Los Angeles, California.

3. Full name of labor organization, including

local name and number, or person filing charge: Woodworkers Local 530, UB of C & J of A., A. F. of L.

4. Address: 538 Maple Avenue, Los Angeles 13, California. Telephone No. MAdison 2188.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit: United Brotherhood of Carpenters and Joiners of America.

6. Address of national or international, if any: Indianapolis, Indiana.

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By ARTHUR GARRETT,
Attorney

Date: Aug. 29, 1951.

GENERAL COUNSEL'S EXHIBIT No. 21

United States of America
Before the National Labor Relations Board
Twenty-first Region

Case No. 21-CA-1053

In the Matter of

REHRIG-PACIFIC COMPANY
and
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, WOODWORKERS LOCAL 530, AFL
and
REHRIG EMPLOYEES' BENEFIT GROUP

AMENDMENT TO COMPLAINT

Please Take Notice that the Complaint in the above-entitled matter, issued June 15, 1951, is hereby amended as follows:

1. Add paragraph 11 to Complaint—

"11. Rehrig Employees' Benefict Group is a labor organization within the meaning of Section 2 (5) of the Act."

", 12 and 13" following the figure "8" in the sec-

"12. In February, 1951, and March, 1951, Respondent, through Richard Gildart, its factory superintendent, did cause to be formed a labor organization of its employees called Rehrig Employees' Benefit Group and did then and thereafter, to and including the date hereof, dominate and interfere with the formation and administration of

said labor organization and contribute financial and other support thereto."

3. Add paragraph 13 to Complaint—

"13. Respondent, by the acts set forth in paragraph 12 hereof, did engage in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1) and (2) of the Act."

4. Paragraph 9 of the Complaint is amended by adding—

", 12 and 13 following the figure "8" in the second line thereof.

5. Paragraph 10 of the Complaint is amended by adding—

"(2) following the figure (1) in the fourth line thereof.

/s/ GEORGE H. O'BRIEN,
Counsel for the General Counsel
National Labor Relations Board
Twenty-first Region.

Dated at Los Angeles, California, this 29th day of August, 1951.

GENERAL COUNSEL'S EXHIBIT No. 25

[Title of Board and Cause.]

ANSWER OF REHRIG EMPLOYEES' BENEFIT GROUP TO COMPLAINT AND AMENDMENT TO COMPLAINT

Comes now the Rehrig Employees' Benefit Group, appearing for itself alone, and in answer to the

complaint and the amendment to complaint on file herein, admits, denies and alleges as follows:

I.

Respondent has no information or belief on the subject sufficient to enable it to answer the allegations of paragraphs 1, 2, 3, 4, 6, 7, 8, 9, and 10 and placing its denial on that ground denies generally and specifically every allegation contained therein.

II.

Denies both generally and specifically each and every allegation contained in paragraph 6, and in that connection alleges that an election was held, under the supervision of Regional Director of the National Labor Relations Board, Twenty-first Region, by the employees of Rehrig Pacific Company, for the specific purpose of determining whether or not the employees desired to have the United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, AFL represent the said employees as their bargaining agent. In the said election the majority of the employees voted against the said labor organization. Thereafter and to wit on or about the early part of March, 1951, the said employees by a majority vote decided to form the Rehrig Employees' Benefit Group, and in fact did form said group and said employees authorized the Rehrig Employees' Benefit Group to act as the bargaining agent for the employees. That said group has since said date been the only and exclusive bargaining agent for the employees of Rehrig Pacific Company.

III.

Admits the allegations contained in paragraph 11.

IV.

Denies both generally and specifically each and every allegation contained in paragraphs 12 and 13.

Wherefore respondent prays as follows:

1. The matter concerning respondent be dismissed.

1. That this respondent be recognized as the sole and exclusive bargaining agent of the employees of Rehrig Pacific Company.

3. That Rehrig Pacific Company be restrained from recognizing any other group, other than the Rehrig Employees' Benefit Group, as the collective bargaining agent of the employees of Rehrig Pacific Company.

Dated: September 8, 1951.

/s/ EDWARD I. GORMAN,
Attorney for Rehrig Employees' Benefit Group.

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 26

[Title of Board and Cause.]

ANSWER TO AMENDMENT TO COMPLAINT

Comes now Rehrig-Pacific Company, respondent in the above-entitled matter, and in answer to amendment to complaint herein, denies as follows:

1. This answering respondent has no information and belief sufficient to enable it to answer the allegation contained in paragraph 1 of the Amendment to Complaint (adding paragraph 11 to the complaint) and upon that ground denies generally and specifically said allegation.

2. Denies generally and specifically each and every allegation and part thereof set forth in paragraphs 2, 3 and 5 of the Amendment to the Complaint being designated paragraphs 12 and 13 of the complaint in said Amendment to Complaint and adding a portion to paragraph 10 of the complaint.

Wherefore, this answering respondent prays that the complaint together with the amendment thereto be dismissed and that no action be taken thereunder.

Dated this 7th day of September, 1951.

/s/ JOE ORLOFF,
Attorney for Respondent, Rehrig-Pacific Company.

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 27

National Labor Relations Board

INTERSTATE COMMERCE DATA

Please fill in blanks and return promptly.

I. The exact legal title of our firm is Rehrig Pacific Co.

II. The firm is: (3) individual business.

* * * * *

(3) If individual business, the name as it appears on certificate of business is Muriel H. Rehrig, dba.

III. The general nature or type of our business is Manufacture of Milk Crates.

IV. Our principal purchases are: (a) Material for future processing (specify) Hardwood, Metal, Wire, Rivets. (b) Equipment and machinery (specify) Machinery for the Manufacture of Milk Crates.

V. During the twelve-month period ending 12-31-50 (the most recent period for which data are readily available) the value of our purchases of materials, equipment and supplies was approximately $441,000.00. Approximately 72% of the value of such materials, equipment and supplies was shipped directly to our plant from places outside the state where our plant is located. Of the total value of materials purchased from local sources, we estimate that 30% originated outside the state.

VI. During said period, the value of the sales of our products and services was approximately $702,000.00. Approximately 27% of the value of

those products was shipped to (or the services rendered in) states other than the state where our plant is located. Approximately 2% of the value of our products was sold locally to concerns which sell a substantial portion of their products in other states.

VII. Our company will stipulate the facts set forth above.

(1) Yes.

/s/ B. H. REHRIG,
Manager.

Date: 2-12-51.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

George H. O'Brien, Esq., for the General Counsel. Joe Orloff, Esq., for the Respondent. Arthur Garrett, Esq., for the Union. Edward I. Gorman, Esq., for the Independent.

Before: Howard Myers, Trial Examiner.

Statement of the Case

Upon a charge duly filed on March 5, 1951,[1] by United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, herein called the Union, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel and the Board, issued his complaint on June 15, alleging that Muriel H. Rehrig, doing

[1] Unless otherwise noted, all dates refer to 1951.

business under the firm name and style of Rehrig-Pacific Company, herein called the Respondent, had engaged in, and was engaging in, unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act.

Copies of the complaint and the charge, together with notice of hearing thereon, were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that the Respondent (1) since on or about January 31, has failed and refused to bargain collectively with the Union although the Union previously had been designated and selected the exclusive collective bargaining representative by the majority of the Respondent's employees in a certain appropriate unit; and (2) on various dates in February, by means of certain stated acts and conduct, interfered with, restrained, and coerced her employees in the exercise of the rights guaranteed in Section 7 of the Act.

On June 26, the Respondent duly filed an answer admitting certain allegations of the complaint but denying the commission of the unfair labor practices.

Pursuant to notice, a hearing was held on various dates between August 27 and September 13, before the undersigned, the duly designated Trial Examiner. The Respondent, the Union, and the General Counsel were represented by counsel. On the third

day of the hearing (August 29) the Union duly filed an amended charge alleging that Rehrig Employees Benefit Group, herein called the Independent, was existing in violation of the Act. On the same day (August 29) the General Counsel served upon the Respondent copies of an amended charge and "Amendment to Complaint"; served upon the Independent copies of the charge, the amended charge, the complaint, and Amendment to Complaint; and then moved to amend the complaint to include an allegation that the respondent formed and dominated the Independent and interfered with its administration. The motion to amend was granted over the objection of the Respondent's counsel.

On August 30, the Independent appeared by counsel who requested time to serve and file an answer and to prepare for trial. The Respondent's counsel also asked for time to file an answer to the complaint, as amended, and to prepare his case to meet the new matter. The undersigned granted the said applications on August 30, and continued the hearing until September 10. On the latter date the hearing proceeded. All parties participated in the hearing and full opportunity was given them to examine and cross-examine witnesses and to introduce evidence pertinent to the issues. At the conclusion of the taking of the evidence, the General Counsel moved to conform the pleadings to the proof with respect to minor discrepancies. The motion was granted without objection. The undersigned then advised the parties that they might file briefs with him on or before September 24. A brief has

been received from the Respondent which has been carefully considered.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The business of the Respondent

Muriel H. Rehrig, doing business under the firm name and style of Rehrig-Pacific Company, has her plant and principal place of business in Los Angeles, California, where she is engaged in the manufacture, sale, and distribution of milk crates. The Respondent annually ships finished products valued at approximately $200,000 to points located outside the State of California.

The Respondent concedes, and the undersigned finds, that the Respondent is engaged in commerce, within the meaning of the Act.

II. The organizations involved

United Brotherhood of Carpenters and Joiners, Woodworkers Local 530, affiliated with American Federation of Labor, and Rehrig Employees Benefit Group, are labor organizations admitting to membership employees of the Respondent.

III. The unfair labor practices

A. Formation and domination of, interference with, and support of the Independent; interference, restraint, and coercion.

1. The pertinent facts.

During the last week in January, the Union commenced an organizational drive among the Respondent's employees which met with such a favorable response that by the end of the month, 46 of the 75 production and maintenance employees then in the Respondent's employ had signed cards expressly authorizing the Union to represent them for the purposes of collective bargaining.

On January 31, Nick Cordil and Robert McKinzie, two officials of the Union, called upon Houston Rehrig, the Respondent's son and manager of the plant, herein called Rehrig; informed him that the Union represented the majority of the production and maintenance employees; proffered to him, for inspection and verification, the aforesaid 46 signed authorization cards; requested recognition of the Union as the collective bargaining agent for the Respondent's production and maintenance employees; and requested that collective bargaining negotiations be commenced.

In response to the Union officials' statements and requests Rehrig stated, according to Cordil's credited testimony, that he (Rehrig) had "met with some of the employees and that he knew [the Union] represented a majority of the employees," but desired a little time to think matters over before granting the Union recognition.[2]

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[2] Rehrig testified that he declined the offer to inspect the signed cards and stated to Cordil and McKinzie, "for the time being I would let the matter rest on the basis that their statement was true, that the cards were signed and I wasn't going to take issue with it."

Upon leaving Rehrig's office, after agreeing to his request for time to consider the matter, Cordil and McKinzie went to their offices where Cordil dictated a letter advising the Respondent that the Union represented the majority of the production and maintenance employees and requested that a meeting be held at the Respondent's earliest convenience. The same afternoon (January 31) McKinzie delivered the said letter to Lewis Kiser, the Respondent's son-in-law and her office and production manager.

Several days later, Cordil, McKenzie, and 2 other officials of the Union called upon Rehrig. After discussion had been had with respect to the Union's demand for recognition and the wage scale contained in the contract which the Union then had with a competitor of the Respondent, Rehrig requested and received additional time in order, to quote Rehrig, "to check into the matter."

On February 5, after Rehrig was unable to reach McKinzie on the telephone, he admittedly instructed a female clerk in the Respondent's office to telephone McKinzie's office "and tell them that we would like to have [a Board] election because it appeared to us to be some question about how the men felt in the plant" with respect to being represented by the Union.

Pursuant to the aforesaid message, McKinzie, on February 5, filed with the Board a representation petition. In accordance with the consent election agreement entered into by and between the Respondent and the Union on February 13, and approved the same day by the Regional Director for the

Twenty-first Region, an election was conducted under the auspices of the said Regional Director on February 23, among the Respondent's production and maintenance employees. The Union lost the election.[3]

On February 28, the Union filed "Objections to Conduct Affecting the Outcome of Election." In his "Report on Objections," dated May 24, the Regional Director found that the Respondent interfered with the employees' rights to a free and untrammeled election and ordered the election of February 23 set aside and the results thereof voided.

While Rehrig was seeking and securing time "to check into the matter" of recognizing and bargaining with the Union, he and the Respondent's other managerial representatives were engaging in steps to destroy the Union's majority status and thus thwart the Union's organizational plans. Thus, on either January 30 or 31, but in any event prior to Rehrig's January 31 meeting with Cordil and McKinzie, Richard Gildart[4] called Employer Edward Baca into his private office and there interrogated Baca about his Union activities and sympathies. Regarding this meeting, Baca testified, and the un-

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[3] Of the 61 valid ballots cast, 26 were cast for the Union, 33 against, and 2 were challenged.

[4] Variously referred to in the record as plant superintendent, plant supervisor, and foreman. Contrary to Respondent's contention, the undersigned finds that Gildart is a supervisor within the meaning of the Act and therefore his proscribed conduct and activities, as found herein, are attributable to the Respondent.

dersigned finds, that Gildart, in the presence of former Employee Edward Hinojosa, expressed surprise that he, "of all people," was the person who brought the Union in the plant; that in response to Gildart's question, "if you are bringing [in] the Union how do you know the company can stand something like this," he replied that he did not know; that Gildart then retorted, he should have "come down and [found] out" from Gildart; that he replied, "to tell the truth, I didn't bring it down to you because it interfered (sic) with you asking whether the company could take it or not. I just thought being the men want more money and they want the Union, that now we have the chance we might still get the Union in"; and that the interview concluded shortly after Gildart remarked, "you know, if the Union does come in the company won't be able to operate every day, half the men around here will have to work three days, and maybe the only ones working the whole week will be the guys on the saws in order to get ahead enough work so we can do it in those three days because the [other] men are faster" workers than those working on the saws.

Regarding a conversation he had with Kiser on February 2, and regarding certain other events which took place that day, Employee Alfred Maldonado testified, and the undersigned finds, as follows:

Q. Now, will you relate the conversation [with Kiser]?

A. * * * I wanted to tell him (Kiser) that some

of the boys in the shop came up and told me that they didn't want to join the Union. * * * They told me they wanted to see if we could get our own union. I didn't know much about it and I went up to ask him what could be done to back these boys up. * * * * *

Q. What did he say?

A. He said, "you have to have a majority." I showed him a slip of paper that I had written some names on and he said there wasn't enough to back me up. I went out to the shook department, the wood department, and asked some of the boys there and all agreed to back me up on it. I put their names down and I had about—I am not sure, but I think I had about 35 or 40 of them. Then I went back and showed him the paper and he said that was enough.

Kiser testified, and the undersigned finds, that Maldonado told him on February 2, "he had a group of fellows who did not want the Union; some of whom had signed cards, some hadn't * * * [and] there was a lot of confusion" among the employees; that he told Maldonado "I had called the National Labor Relations Board asking them to send me information on the percentage of representation, and so forth * * * According to them (NLRB), as I understood it, any group they represented had to have a majority"; that Maldonado said, "I have this list"; that he glanced at the list and after noting it contained only about 20 or 25 names, he said to Maldonado, "I don't think there is much you can do. You don't have a majority";

that Maldonado then left his office, but returned "in a few minutes or in a short period" and said he had secured additional names to the list, adding that the names of the majority of the employees were on the list; that after he looked at the list he remarked to Maldonado, "It looks to me like they are all in your handwriting" to which Maldonado replied, "Well, I just asked them and jotted them down. These aren't any signatures, this is just what they have told me"; that Maldonado left his office after he said, "Well, I will check, I will talk to Mr. Rehrig about it"; that as Maldonado was leaving his office Gildart entered and he told Gildart about his conversation with Maldonado and requested Gildart to vertify the accuracy of Maldonado's assertions; and that Gildart left the office, returned shortly, stated that he had contacted everyone in the plant, and the majority of the employees were not in favor of the Union.

Gildart testified, and the undersigned finds, that after Kiser told him about the latter's talk with Maldonado, he went into the plant and asked the various employees if they "wanted the union or didn't want it"; that as soon as "35 or so" employees had informed him that they were not in favor of the Union, he determined that the majority of the employees were against the Union; and that immediately after reaching this decision he advised Kiser thereof.

Gildart further testified, and the undersigned finds, that about a month prior to the Union's campaign to organize the Respondent's employees, he

spoke separately to Rehrig, Kiser, Maldonado, and certain unnamed employees about "a plan" to form a "bargaining organization among the employees" for the purpose of dealing with the Respondent with respect to, among other things, paid holidays, a hospital plan, and a profit-sharing plan in order to "have something that we could all benefit by and have [as] our own, instead of dealing with anyone else"; that sometime in the latter part of January or early in February, at his suggestion, the employees selected from among themselves, on company time and property, 6 or 7 persons to represent the various plant departments; that on or about February 7, he met with aforesaid selected representatives and discussed with them the contemplated layoff of seven employees; and that the said seven employees were laid off on February 9.

About three or four days after the aforementioned January 30 or 31 talk between Baca and Gildart, the latter told Baca, Coffey, and Telke[5] to quote Gildart's testimony, which the undersigned credits:

* * * that I had a plan that I thought would benefit better the men in the plant, that we could probably work out something maybe as good or better than the union, and at the same time we would be in our own organization. We would not have to deal or have anything to do with anyone else, and we could determine our own activity.

Gildart further testified, and the undersigned

[5] Gildart testified that he believed Hinojosa also was present.

finds, that during the aforesaid conversation he stated that if the employees selected "the ones that you want" and "tell me when you are ready * * * we can beat" the Union "to the office."

Sometime between the filing of the representation petition on February 5, and the execution of the consent election agreement on February 13, Rehrig because, as he testified, of the terrific drop in production and for the additional reason that he had been informed by an employee that "the men in the plant were scared to death of me, they felt I was going to do something terrible to them because of this fact that these cards had been signed, that a lot of them were going to lose their jobs and there was just all kinds of rumors running rife through the plant", he assembled the employees and told them, in substance, that the employees had the absolute right to join or refrain from joining the Union, and that the employees' Union activities would not be interfered with.

On February 22, Rehrig assembled the employees, reminded them of the Board election to be held the following day, told them to vote either for or against the Union as they saw fit, that "McKinzie and his organization were a very high type of men, that they would represent [you] properly and that [you have] nothing to fear from them", that if the employees selected the Union as their representative he would deal with it as such, and that the employees' jobs would not be in jeopardy if the Union won the election.

After Rehrig made the aforesaid remarks, Telke asked Rehrig, "what about this profit-sharing plan we have been talking about. Tell the fellows something about that."[6] Thereupon, Rehrig outlined to the employees "an incentive p lan on a profit-sharing basis whereby the company would take 25 per cent of the profits and that this money would be used in a fund set up on a basis that would be approved by the government." Rehrig then explained that he did not believe that the entire 25 per cent could be paid directly to the men because of certain governmental restrictions placed on wages, adding that the money which could not be paid directly to the men would be put into a pension fund for the benefit of the employees.

After Rehrig had concluded the aforesaid remarks, Telke asked, "would that profit-sharing plan be put into effect if we vote for the Union?" to which Rehrig replied, to quote Rehrig's testimony:

I don't know exactly the words I used, but they were to the effect that undoubtedly it couldn't be put into effect that way, that there would have to be changes made in it and I couldn't foresee what the final result would be. I can't remember the words, but it was enough to make it clear that very

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[6] Admittedly, the only persons connected with the Respondent with whom Rehrig discussed the possibility of instituting a profit-sharing plan were Kiser, Gildart, and Telke and that the discussions with Gildart and Telke took place in December, 1950.

likely the final result wouldn't be the same.

Regarding Rehrig's remarks about the establishment of the profit-sharing plan if the Union was successful at the polls, Telke testified that Rehrig said in substance "it wasn't up to him, it [would be] out of his hands, or something like that"; Kiser testified that Rehrig, after shrugging his shoulders and tossing "his hands aside," stated, in substance, "that would be hardly one that he could answer, that it wouldn't exactly be solely in his hands"; Gildart testified that Rehrig remarked, after shrugging his shoulders and half smiling, "it would be up to the men, or something to that effect. More or less, 'it is up to you fellows,' was the term he used"; Baca testified that Rehrig stated, "No, you won't"; Employee Frank Marquez testified that Rehrig said that the profit-sharing plan would not be established if the Union won the election because the employees then "would be entirely on their own"; and Employee Domingo Delgado testified that Rehrig remarked, "if the Union wins, you are on your own, boys." It is thus clear, and the undersigned finds, that Rehrig's evasive reply to Telke's question, suggestive of a negative reply, was to the effect that the Respondent would not put into operation the proposed profit-sharing plan if the employees did not repudiate the Union at the polls.

The undersigned also finds that Rehrig, in his February 22 speech, suggested that the employees consult with Kiser or with Gildart regarding "the

formation of an inside Union.'"[7]

Gildart testified, and the undersigned finds, that early in March, the Independent was formed and, among other things, the Independent was to deal with the Respondent respecting personnel problems; that its formation came about after he had "Sent out word" and placed on the plant's blackboard a notice that the employees should select, from among themselves, four persons to head this new organization; that the employees selected Maldonado, Carlos Taylor, Hinojosa, and himself; that the said four named individuals then selected Taylor, president, Maldonado, vice-president, Hinojosa, secre-

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[7] Rehrig was not questioned regarding this phase of his speech even though Gildart had previously testified as follows:

Q. Going back again briefly to Rehrig's speech the day before the election, do you remember Mr. Rehrig stating in the speech, suggesting to the employees that they get together and contact either Mr. Kiser or yourself in connection with the formation of an inside union?

A. I believe he mentioned something like that, yes.

Trial Examiner Myers: What is your best recollection?

The Witness: Well, it was mentioned.

Trial Examiner Myers: By Mr. Rehrig?

The Witness: Yes.

And Delgado had previously testified that Rehrig stated during the course of the said speech, "you should not be afraid or hesitate to call on Mr. Kiser or Mr. Gildart to go and form some kind of a company * * * [I am] willing to try the bonus and give [you] a try on it to form a company of [your] own; to get a committee of four persons, that it was better for [you] to get together, instead of a union, because [you are] on [your] own."

tary, and himself, treasurer; that membership in the Independent, which is restricted to employees of the Respondent, is automatic after a person, other than a clerical employee, had been in the Respondent's employ for 90 days; that the Independent has no constitution, no by-laws, nor is a member thereof obligated to pay dues; that the Independent had but one general membership meeting since its inception; that the aforesaid March election was held on company time and property; and that the Independent controls that portion of the profit-sharing plan which is not paid directly to the employees but which is deposited in a bank.[8]

2. Concluding findings.

It is evident from the credible evidence, as epitomized above, that the Respondent permitted the Independent to hold its election and conduct some of its business on company time and property; that members thereof were paid by the Respondent for the time spent by them while so engaged; that the Respondent controls the administration of the Independent through Gildart's membership and official position herein and through the retention in her employ of its officers because she could unseat any elected officer by discharging him, for the employees are limited in their choice of officers; that no employee is eligible to become a member of the Independent until he had been in the Respondent's

[8] The profit-sharing plan has been in existence since about March 15. However, no moneys were deposited in the bank until about May or June. The deposited moneys are the basis of a pension fund.

employ for at least ninety days; and that the officers of the Independent were elected by four persons and not by its members. Finally, since there is no provision for dues or other form of self-financing, the Respondent is in a position to assure domination over the Independent by subsidizing it. This she has already done when she permitted the employees to engage in business of the Independent on company property and when she paid them for the time so consumed. The entire record indicates, and the undersigned finds, that the Independent exists and functions only through the Respondent's control, participation, financial support, and sufferance. In short, the Independent was formed and is being used by the Respondent as a substitute for collective bargaining and, as such, is a device which has been repeatedly and consistently held by the Board and the courts to be an unlawful form of labor organization.[9]

The undersigned also finds that the Respondent formed, dominated, and interfered with the administration of the Independent, and contributed financial aid and other support to it in violation of Section 8 (a) (2) of the Act, thereby interfering with, restraining, and coercing her employees in the exer-

[9] See NLRB vs. Newport News Shipbuilding & Drydock Co., 308 U. S. 241; NLRB vs. Baldwin Locomotive Works, 128 F. 2d 39 (C. A. 3); Bethlehem Steel Co. vs. NLRB, 120 F. 2d 641 (App. D. C.); Westinghouse Electric & Mfg. vs. NLRB, 112 F. 2d 657 (C. A. 2); Budd Mfg. Co. vs. NLRB, 138 F. 2d 86 (C. A. 6); and NLRB vs. Rath Packing Co., 123 F. 2d 684 (C. A. 8).

cise of the rights guaranteed in Section 7 thereof.

The undersigned further finds that (1) by Gildart's threat to Baca on or about January 30 or 31, to shorten the employees' work-week if the Union successfully organized the plant,[10] (2) by Gildart's interrogation of the employees regarding their union membership and sympathies,[11] and (3) by Rehrig's promise on February 22, to establish a profit-sharing plan for the employees provided the employees repudiated the Union at the polls on February 23,[12] the Respondent interfered with,

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[10] See H. J. Heinz vs. NLRB, 311 U. S. 514; Medo Photo Supply Corp. vs. NLRB, 321 U. S. 678; NLRB vs. Vermont American Furniture Corp., 182 F. 2d 842.

[11] See H. J. Heinz vs. NLRB, supra; NLRB vs. Minnesota Mining & Manufacturing Co., 179 F. 2d 323 (C. A. 8); NLRB vs. National Products Co., 175 F. 2d 755 (C. A. 4); NLRB vs. Sewell Mfg. Co., 172 F. 2d 459 (C. A. 5); Joy Silk Mills, Inc., vs. NLRB, 185 F. 2d 732 (C. A. D. C.)

[12] See NLRB vs. Wytheville Knitting Mills, Inc., 175 F. 2d 238 (C. A. 3); NLRB vs. Jahn & Ollier Ingraving Co., 123 F. 2d 589 (C. A. 7); NLRB vs. Crown Can Company, 138 F. 2d 263 (C. A. 8). The fact that Rehrig had the profit-sharing plan under consideration for several months prior to the announcement is irrelevant. The fact remains that the plan was announced on the eve of the election. The time chosen by Rehrig to advertise his bounty could only have been intended by him to prevent, as the Court said in NLRB vs. Christian Board of Publication, 113 F. 2d 678, 681, the "attempts of [the] outside labor organization to appeal to its employees * * *" See also Gate City Cotton Mills, 70 NLRB 238, aff'd. 167 F. 2d 647 (C.A. 5); Minnesota Mining & Mfg. Co., 81 NLRB 557, aff'd. 179 F. 2d 323 (C. A. 8).

restrained and coerced her employees in violation of Section 8 (a) (1) of the Act. The fact that in his two speeches to the employees prior to the election, Rehrig informed the employees that they might, without fear of discrimination or other reprisal, vote for the Union and that in case the Union won the election he would bargain collectively with it, did not expunge the effects of Gildart's previous coercive statements and conduct nor his own subsequent promises of benefit if the Union lost the election.

B. The refusal to bargain collectively with the Union.

1. The appropriate unit.

The complaint alleged that all the production and maintenance employees of the Respondent, excluding office and clerical employees, watchmen, guards, professional employees, and supervisors as defined by the Act, constitute a unit appropriate for the purposes of collective bargaining. The answer of the Respondent neither admitted nor denied the aforesaid allegation. Under the circumstances, and upon the record as a whole, the undersigned finds that all the production and maintenance employees of the Respondent, excluding office and clerical employees, watchmen, guards, professional employees, and supervisors as defined by the Act, at all times material herein constituted, and now constitute, a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act, with respect to grievances, rates of pay, wages,

hours of employment, and other conditions of employment, and that the said unit insures to the Respondent's employees the full benefit of their right to self-organization and collective bargaining and otherwise effectuates the policies of the Act.

2. The majority status of the Union in the appropriate unit.

At the hearing herein, there was introduced in evidence by the General Counsel a list prepared by the Respondent containing the names of all the Respondent's employees in the unit hereinabove found appropriate. The list shows that on January 31, 1951, the Respondent had in her employ 75 persons in the said unit. On behalf of the General Counsel there were offered in evidence 46 signed cards expressly authorizing the Union to represent the signers thereof for collective bargaining. The said cards were then submitted to Respondent's counsel for examination and to permit him to compare the signatures thereon with the Respondent's records. After inspection and comparison, Respondent's counsel stated on the record, "the signatures on the cards are [the] signatures of the persons who have signed other documents in [the] possession of" the Respondent.[13] The cards were then received in evidence without objection.

The undersigned has compared the names appearing on the cards with the list submitted by the Respondent and received in evidence and finds that

[13] Respondent's counsel conceded that the card signed Rafael Barron Ruiz to be the card of Employee Rafael Barron Ruiz de Velasco.

as of January 31, 1951, 46 employees in the appropriate unit signed cards designating the Union as their collective bargaining representative. The undersigned accordingly finds that on January 31, 1951, and at all times thereafter, the Union was the duly designated collective bargaining representative of the Respondent's employees in the unit found appropriate. Pursuant to Section 9 (a) of the Act, the Union was, therefore, the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to grievances, rates of pay, wages, hours of employment, and other conditions of employment.

In support of its contention that the Union did not represent an uncoerced majority at all times after January 31, the Respondent points to the fact that Maldonado submitted to Kiser on February 2, a list which appeared to contain the names of some 35 or 40 employees. Assuming, arguendo, that "some 35 or 40" employees had in fact authorized Maldonado to place their names on the list and had told him that they did not desire to be represented by the Union, that fact, standing alone, does not rebut or refute the positive evidence that 46 of the then 75 employees had, on January 31, authorized the Union to represent them.

3. The refusal to bargain.

Uncontroverted evidence establishes that as of January 31, when the Union attempted to negotiate with the Respondent on behalf of the production and maintenance employees, the Union was, in fact, the designated representative of the majority of the

said employees for the purposes of collective bargaining. Under these circumstances, the Respondent's refusal to recognize the Union was a clear violation of Section 8 (a) (5) of the Act, unless the Respondent at that time had a bona fide doubt that the Union represented the majority.

The Respondent's conduct immediately before and following the Union's request for collective bargaining fully reveals the Respondent's want of good faith. Rehrig's and Gildart's actions in embarking upon a campaign to destroy employee support for the Union through means proscribed by the Act demonstrates that the refusal to bargain and Rehrig's request for time to consider the demands of the Union and Rehrig's later request for a Board election were not based upon any desire to resolve a bona fide doubt of the Union's majority. Normally, the Board does not hold an employer in violation of the Act if he in good faith questions the union's majority status, and asks to have the matter determined by an election, since that is a conclusive means of establishing the extent of a union's strength. But as here the Respondent's resort to unfair labor practices, the gravity of which cannot be minimized, reveals, in unmistakable clarity, that the Respondent's insistence upon an election was not seriously motivated, but was actuated by a desire to obtain time within which to dissipate the Union's unquestioned majority, an end which was accomplished when the Union lost the election, the Respondent thereby destroyed the efficacy of the very method it had insisted upon by its refusal to

recognize and deal with the Union. The Respondent's conduct on and after January 31, thus clearly supports a finding that Rehrig's request for an election was solely for the purpose of delay and to permit an effectual destruction of the Union's majority. Under these circumstances, the Respondent "has transgressed the bounds of permissible conduct to a sufficient extent to permit [a conclusion] that [her] refusal to bargain was ill-intentioned as [her] other actions."[14]

Upon the entire record in the case, the undersigned finds that on January 31, 1951, and at all times thereafter, the Respondent failed and refused to bargain collectively with the Union as the duly designated representative of a majority of her employees in the unit hereinabove found appropriate in violation of Section 8 (a) (5) of the Act, thereby interfering with, restraining, and coercing her employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I,

[14] Joy Silk Mills, Inc., vs. NLRB, 185 F. 2d 732, 734 (C. A. D. C.). See also Frank Bros. vs. NLRB, 321 F. 2d 702; NLRB vs. Consolidated Machine Tool Co., Inc., 163 F. 2d 373 (C. A. 2); NLRB vs. Federbush Co., Inc., 121 F. 2d 954 (C. A. 2); NLRB vs. Morris P. Kirk & Son, 151 F. 2d 490 (C. A. 9).

above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in unfair labor practices, violative of Section 8 (a) (1), (2), and (5) of the Act, it will be recommended that she cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent formed, dominated, interfered with the administration and contributed financial and other support to, the Independent, the undersigned will recommend, because the existence of the Independent and its recognition of it by the Respondent constitute a continuing obstacle to the employees' rights guaranteed by the Act, that the Respondent withdraw and withhold all recognition from the Independent as the representative of any of the Respondent's employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment and to completely disestablish it as such representative.

Having found that the Respondent agreed to permit the Independent to administer a certain portion of the funds derived from the profit-sharing plan

established by the Respondent for the employees' benefit, which arrangement is one of the means whereby the Respondent has utilized the unlawfully formed, dominated, and supported Independent to frustrate self-organization and to defeat genuine collective bargaining by the employees, the undersigned will recommend that the Respondent cease and desist from giving effect to said arrangement or to any like arrangement. Nothing herein shall be taken to require the Respondent to vary the terms of the profit-sharing plan hereto established by the Respondent.

Having found that the Respondent has refused to bargain collectively with the Union as the representative of the majority of the employees in an appropriate unit, the undersigned will recommend that the Respondent, upon request, bargain collectively with the Union as the exclusive statutory representative of all the employees in the unit herein found appropriate, and if an agreement is reached, embody such understanding in a signed agreement.

The scope of the Respondent's illegal conduct discloses a purpose to defeat self-organization among its employees. It sought to coerce them in the exercise of the rights guaranteed them by the Act by, among other things, refusing to bargain collectively with the statutory representatives of its employees and by forming, dominating, and interfering with the administration of the Independent. Such conduct, which is specifically violative of Section 8 (a) (1), (2), and (5) of the Act, reflects a determination generally to interfere with, coerce, and restrain its

employees in the exercise of the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, and presents a ready and effective means of destroying self-organization among its employees. Because of the Respondent's unlawful conduct and since there appears to be an underlying attitude of opposition on the part of the Respondent to the purposes of the Act which is to protect the rights of employees generally,[15] the undersigned is convinced that if the Respondent is not restrained from committing such conduct, the danger of their commission in the future is to be anticipated from the Respondent's past conduct, and the policies of the Act thereby will be defeated. In order, therefore, to make effective the interdependent guarantees of Section 7 of the Act, to prevent a recurrence of unfair labor practices, and thereby minimize industrial strife which burdens and obstructs commerce, and thus effectuate the policies, the undersigned will recommend that the Respondent cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the undersigned makes the following:

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[15] See May Department Stores vs. NLRB, 326 U. S. 376.

Conclusions of Law

1. United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, affiliated with American Federation of Labor, and Rehrig Employees Benefit Group, are labor organizations, within the meaning of Section 2 (5) of the Act.

2. All the Respondent's production and maintenance employees, excluding office and clerical employees, watchmen, guards, professional employees, and supervisors as defined by the Act, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, affiliated with American Federation of Labor, was on January 31, 1951, and at all times thereafter has been, the exclusive representative of all the employees in such unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on January 31, 1951, and thereafter, to bargain collectively with United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, affiliated with American Federation of Labor, as the exclusive representative of all the employees in the appropriate unit the Respondent has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8 (a) (5) of the Act.

5. By the said refusal the Respondent interfered with, restrained, and coerced her employees in the

exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8 (a) (1) of the Act.

6. By forming, dominating, and interfering with the administration of the Rehrig Employees Benefit Group, and by contributing financial and other support to it, the Respondent has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8 (a) (2) of the Act.

7. By interrogating her employees regarding their Union memberships and sympathies, by threatening the employees with reprisal if they became or remained members of the Union, by promising benefits if the employees repudiated the Union, and by otherwise interfering with, restraining, and coercing her employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8 (a) (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that Muriel H. Rehrig, doing business under the firm name and style of Rehrig-Pacific Company, her agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing, upon request, to bargain collectively with United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, affiliated with American Federation of Labor, as the exclusive representative of her employees in the above-described appropriate unit;

(b) Forming, dominating, supporting, or interfering with the administration of the Rehrig Employees Benefit Group, or any other labor organization of her employees;

(c) Recognizing Rehrig Employees Benefit Group, as the representative of any of her employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment;

(d) Giving effect to any and all arrangements or agreements with Rehrig Employees Benefit Group;

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist American Federation of Labor or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condi-

tion of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, affiliated with American Federation of Labor, as the exclusive representative of the employees in the appropriate unit, and embody in a signed agreement any understanding reached;

(b) Withdraw and withhold all recognition from, and completely disestablish, Rehrig Employees Benefit Group, as the representative of any of her employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or any other conditions of employment;

(c) Post at her place of business in Los Angeles, California, copies of the notice attached hereto marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Twenty-first Region after being signed by the Respondent or her representative shall be posted by the Respondent and maintained by her for sixty (60) consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Twenty-

first Region in writing within twenty (20) days from the receipt of this Intermediate Report and Recommended Order what steps the Respondent has taken to comply herewith.

It is also recommended that unless the Respondent shall within twenty (20) days from the receipt of this Intermediate Report and Recommended Order notify said Regional Director in writing that she will comply with the foregoing recommendations the Board shall issue an order requiring the Respondent to take the action aforesaid.

Dated this 12th day of October, 1951.

/s/ HOWARD MYERS,
Trial Examiner

APPENDIX A

Notice to all Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, I hereby notify my employees that:

I Will bargain collectively upon request with United Brotherhood of Carpenters and Joiners or America, Woodworkers Local 530, affiliated with American Federation of Labor, as the exclusive bargaining representative of all employees in the bargaining unit described herein and if an understanding is reached embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees excluding office, clerical, guards, watchmen, profes-

sional employees, and supervisory employees as defined in the Act.

I Will Not question my employees concerning their union membership, sympathies or activities, threaten them with reprisals for engaging in union activities or penalize employees because of their union membership or activities.

I Will Not promise my employees benefits if they repudiate United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, affiliated with American Federation of Labor.

I Hereby Disestablish Rehrig Employees Benefit Group, as the representative of any of my employees for the purpose of dealing with me concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, and I will not recognize it, or any successor thereof, for any of the above purposes.

I Will Not dominate or interfere with the formation or administration of any labor organization of my employees or contribute financial or other support to it.

I Will Not give effect to any and all arrangements and agreements with Rehrig Employees Benefit Group, or any successor thereto.

I Will Not in any other manner interfere with, restrain, or coerce my employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, A. F. of L., or any other labor organization to bargain collectively through representatives

of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

Dated.....

MURIEL H. REHRIG,
doing business under the firm name and style of
Rehrig-Pacific Company (Employer)

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service by Mail attached.

[Title of Board and Cause.]

The first four lines of page 3, and pages 4 through 22 constitute the brief portion of this document and for that reason are not a part of the certified record.

II.

STATEMENT OF EXCEPTIONS

Respondent hereby makes formal objections and

excepts to the following portions of the Intermediate Report and Recommended Order of the Trial Examiner:

(a) Generally, to all portions thereof, including Findings of Fact and Conclusions of Law, and recommendations, which relate to or bear upon the charge under 8 (a) (5);

(b) Specifically, but not to be deemed to be a limitation on the general statement of exceptions stated hereinabove, to the following portions of the report and order:

Page 9, line 34 to end;

Page 10, all;

Page 11, lines 1 through 8; line 23; lines 50 through 57;

Page 12, line 4; lines 50 through 58;

Page 13, lines 30 through 34; lines 46 through 56; lines 61 through 52;

Page 14, lines 1 through 3; and to Appendix A, Paragraph No. 2; Paragraph No. 9.

Respectfully submitted,

/s/ JOE ORLOFF,
Attorney for Respondent, Rehrig-Pacific Company

Dated: December 3, 1951.

United States of America
Before the National Labor Relations Board

Case No. 21-CA-1053

In the Matter of

MURIEL H. REHRIG, d/b/a REHRIG-PACIFIC COMPANY[1]

and

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, WOODWORKERS LOCAL 530, AFL

DECISION AND ORDER

On October 12, 1951, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8 (a) (1), 8 (a) (2) and 8 (a) (5) of the Act, and recommending that the Respondent cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report[2] attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

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[1] The Respondent is designated in the complaint and other pleadings as Rehrig-Pacific Company. The record, however, shows Muriel H. Rehrig, an individual doing business as Rehrig-Pacific Company, to be the Respondent herein. We have so amended all the formal papers.

[2] The Rsepondent addressed its exceptions solely to the finding of 8 (a) (5).

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and supporting brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the additions and modifications set forth below.

1. The Trial Examiner found, and we agree, that, by (a) Supervisor Gildart's threat to employee Baca on about January 30 or 31, 1951, to shorten the work week if the Union successfully organized the plant, (b) Gildart's interrogation of employees on February 2 concerning their union membership and sympathies, and (c) Plant Manager Rehrig's promise to the employees on February 22 to establish a profit-sharing plan if the employees repudiated the Union in the Board election on the following day, the Respondent violated Section 8 (a) (1) of the Act. In addition the record shows, as the Trial Examiner found, on the basis of Gildart's own testimony that, sometime between February 2 and 4, Gildart told Baca and other employees that he had a plan that would "benefit better the men in the plant, that we could probably work out something mayb(as good or better than the union, and at

the same time we would be in our own organization."[3] This statement contained a promise of benefit if the employees rejected the Union and supported an "inside" organization. In these circumstances, we shall, despite the inadvertence of the Trial Examiner, predicate our finding of a violation of Section 8 (a) (1) on this promise as well.

2. The Respondent gave impetus to the formation of an "inside" union almost immediately after the Union's demand for recognition on January 31, 1951. Early in February, Gildart sought to solicit support among the employees for such an organization by the unlawful conduct described above. At about the same time Gildart also suggested to the employees that they select representatives from their ranks to meet with him for the purpose of discussing certain layoffs contemplated by the Respondent and for the purpose of "starting an organization". Shortly before February 7, on company time and property, the employees selected 6 or 7 persons to represent them in the meeting proposed by Gildart. On February 7, these employee representatives met with Gildart in Plant Manager Rehrig's office. Gildart told them of the Respondent's decision to lay off certain employees, and of the reasons therefor. Gildart also discussed with them plans for "perfecting * * * an inside employees'

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[3] It was Baca, not Gildart, as the Trial Examiner found, who testified that on the occasion under discussion Gildart talked about beating the Union to the office. This testimony, which we credit, was not disputed by Gildart.

representation plan." Thereafter, in his pre-election speech of February 22, Plant Manager Rehrig suggested to the employees that they consult with Gildart or Office Manager Kiser regarding the formation of an "inside" union.

Early in March, following the defeat of the Union in the February 23, Board election, the Independent was formally organized.[4] In an election then called by Gildart, and conducted on company time and property, the employees chose four persons employed by the Respondent, including Gildart, to head the Independent.[5] These four individuals then decided among themselves upon the specific office in the organization each was to hold; Gildart thus became the Independent's treasurer. Thereafter, the Respondent delegated to the Independent's officers control over the funds established by it to finance

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[4] At the hearing, Gildart admitted, as the record makes clear, that the Independent came into being as the result of a reorganization of the committee of employee representatives created at his instigation in February. Thus, Gildart testified that:

Some of them [the employee representatives selected in February] were leaving and the formation of the original officers was getting broken up and one thing led to another and the first thing we were having another committee [viz., the Independent].

[5] In a notice posted by Gildart on a plant blackboard prior to the election of officers in the Independent, the employees were advised that the elected officers would "have something to do with the representation plan [theretofore promoted by Gildart] by which employees would be represented in an organization to bargain for them."

the pension plan arrangement announced by Plant Manager Rehrig on the eve of the election.

The Independent has no written constitution or bylaws. Membership therein is confined to employees of the Respondent, and is automatic for those who have spent 90 days in the Respondent's employ; it does not carry with it the obligation to pay membership dues. Since the March election, the Independent has not held more than one general membership meeting.

On the basis of all the foregoing, and for the reasons stated in the Intermediate Report, we find, as the Trial Examiner did, that the Respondent dominated and interfered with the formation and administration of the Independent, and contributed financial and other support thereto, in violation of Section 8 (a) (2) of the Act, and thereby interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act.

3. We agree also with the Trial Examiner's finding that the Respondent has refused to bargain with the Union within the meaning of Section 8 (a) (5) of the Act.

On January 31, 1951, the Union, having been designated by a majority of the employees in the appropriate unit described in the Intermediate Report, requested recognition by the Respondent. Plant Manager Rehrig conceded that the Union represented a majority of the Respondent's employees, but requested time in which to think over the matter of granting it recognition. Three or four days later the Union representatives again con-

tacted Rehrig, who told thim that he had not yet made up his mind and that he would like additional time "to check into the matter." On February 5, the Respondent asked the Union to prove its majority in a Board election. The Union thereupon filed a representation petition with the Board. On February 13, the Respondent gave its consent to an election, which was held on February 23. The Union lost the election by a vote of 33 to 26, with 2 ballots challenged. On February 28, the Union filed objections to the election, and on March 5, it filed the charge in this proceeding. On May 24, the Regional Director issued a Report in which he found that Plant Manager Rehrig's pre-election speech unlawfully interfered with the election and he set the election aside. On June 20, the Union withdrew its representation petition.

The Respondent admits that it refused to bargain with the Union, but contends that it did not thereby violate the Act because (a) it had a good faith doubt about the Union's majority status, and (b) it was under no obligation to bargain with the Union because of the pendency of a question concerning representation.

To support its claim of a bona fide doubt of the Union's majority status, the Respondent points to the fact that on February 2 it was advised by employee Maldonado that a majority of the Respondent's employees had told him that they were opposed to the Union. This incident, however, must be measured against the total congeries of facts. Virtually simultaneously with the Union's initial

request for bargaining on January 31, the Respondent, while conceding the Union's majority, embarked upon a course of conduct which was plainly calculated to undermine the Union. Thus, on January 30 or 31, it threatened the employees with loss of work and wages if the Union succeeded in organizing the plant. On the very day that Maldonado made his report, the Respondent conducted a survey of its employees, interrogating them as to their desires as to union representation. On February 3 or 4, after the Maldonado incident, when the Union renewed its request for recognition, the Respondent did not raise the majority issue. About this time, it promised benefits to the employees if they rejected the Union and supported an "inside" union. The Respondent's request for an election on February 5 was followed by the same pattern of conduct. It proceeded to encourage the selection of a number of employee representatives, who became the nucleus of the Independent, and dealt with them on February 7 concerning employee layoffs. And on February 22, the eve of the election, it made a promise of benefit to the employees, conditioned on their rejection of the Union in the election, and again encouraged the formation of an "inside" organization.

Viewed against this backdrop of conduct which we have found to be violative of the Act, the Maldonado incident is devoid of any controlling significance. The Respondent's threats of reprisal, promises of benefit, and interrogation belie the Respondent's good faith argument and reveal, instead,

that the Respondent, when it asked for time to think over the matter of Union recognition, was motivated by a desire to gain time within which to undermine the Union and avoid its statutory duty to bargain.

We therefore find, as did the Trial Examiner, that the Respondent's refusal to bargain on January 31, its request thereafter for a Board election, and its agreement to a consent election were not motivated by any good faith doubt of the Union's majority.[6] We conclude therefore that the Respondent's refusal to bargain in violation of the Act first occurred on January 31.

As already noted, at the instigation of the Respondent, the Union filed a petition herein on February 5, 1951, 5 days after its initial bargaining request. An election ensued which the Union lost and this representation proceeding was still pending when the charge alleging refusal to bargain was filed. The Respondent argues therefrom that this petition raised a question concerning representation which precludes any finding of a refusal to bargain during the pendency of the petition. We find no merit in the Respondent's position. In the first place, as shown above, the refusal to bargain occurred on January 31, antedating the filing of the

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[6] In view of the nature and timing of the Respondent's unfair labor practice herein, this case is plainly distinguishable from Chamberlain Corporation, 75 NLRB 1118, and Roanoke Public Warehouse, 72 NLRB 1281, relied upon by the Respondent.

petition by 5 days.[7] The petition clearly cannot be given retroactive effect. Secondly, assuming that we were to reach the issue raised by the Respondent, it is clear that there never existed any genuine question concerning representation. Thus, the Respondent initially conceded the Union's majority status in the appropriate unit on January 31, and when it challenged the Union's majority on February 5, it did so in bad faith, as we have found. As the challenge to the Union's majority was made in bad faith, no genuine question concerning representation was raised by that challenge.[8] We therefore regard the election proceeding as a nullity.[9]

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[7] Cf. Joy Silk Mills, Inc., 85 NLRB 1263, enfd. as mod. 185 F. 2d 732 D.C.) cert. dem. 341 U. S. 914; Everett Van Kleeck & Company, Inc., (C.A. 88 NLRB 785, enfd. 189 F. 2d 516 (C.A. 2); D. H. Holmes, Ltd., 81 NLRB 753; The M. H. Davidson Company, 94 NLRB No. 34.

[8] N.L.R.B. vs. National Seal Corporation, 127 F. 2d 776 (C.A. 2); The M. H. Davidson Company, supra; Howell Chevrolet Company, 95 NLRB No. 62.

[9] The Respondent argues that a strong analogy exist between the facts of this case and those in John Deere Plow Company, 82 NLRB 69. Relying on the fact that the majority finding of 8 (a) (5) in the John Deere case was vacated by the Fifth Circuit in 187 F. 2d 26, thereby agreeing with the dissent in the case, the Respondent contends further that the Trial Examiner's finding of 8 (a) (5) should be reversed on the authority of the dissent in John Deere. However, as appears from the above facts, that holding manifestly has no applicability here. Moreover, there are other distinguishing features between this case and the cited case. Here, for

On the basis of all the foregoing, and the entire record, we find, as the Trial Examiner did, that since January 31, 1951, the Respondent has refused to bargain with the Union, in violation of Section 8 (a) (5) and 8 (a) (1) of the Act. Like the Trial Examiner, we shall order it to bargain collectively with the Union upon request.[10]

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Muriel H. Rehrig, d/b/a Rehrig-Pacific Company, Los Angeles, California, her agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, AFL, as the exclusive representative of her employees in the appropriate unit as found in the Intermediate Report;

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example, unlike there, the Respondent conceded the Union's majority status when recognition was requested of it. And in this case the 8 (a) (5) is based on a claim made by the Union before any representation election took place, and not, as in the John Deere case, on a new post-election majority immediately following a representation election the validity of which was in dispute.

[10] To the extent that the February 23 election showed a defection in the Union's support, it was, we find, attributable to the Respondent's unlawful conduct, and therefore cannot serve to bar the usual remedial order issued in cases of this type. Joy Silk Mills, Inc. vs. N.L.R.B. supra.

(b) Dominating and interfering with the formation or administration of, or contributing financial or other support to, Rehrig Employees Benefit Group, or any other labor organization of her employees;

(c) Recognizing Rehrig Employees Benefit Group, or any successor thereto, as the representative of any of her employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment;

(d) Giving effect to any and all arrangements or agreements with Rehrig Employees Benefit Group;

(e) By means of interrogation, threats of reprisal, promises of benefit, or in any other manner, interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the amended Act.

2. Take the following affirmative action which

the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, AFL, as the exclusive representative of her employees in the appropriate unit as found in the Intermediate Report, and embody any understanding reached in a signed agreement;

(b) Withdraw and withhold all recognition from, and completely disestablish, Rehrig Employees Benefit Group, or any successor thereof, as the representative of any of her employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment;

(c) Post at her place of business in Los Angeles, California, copies of the notice attached hereto, marked Appendix A.[11] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being signed by the Respondent or her representative, be posted by the Respondent immediately upon receipt thereof and maintained by her for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily

[11] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order", the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Signed at Washington, D. C., May 19, 1952.

JOHN M. HOUSTON, Member,
PAUL L. STYLES, Member,
IVAR H. PETERSON, Member,
NATIONAL LABOR RELATIONS BOARD

APPENDIX A

Notice to All Employees Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, I hereby notify my employees that:

I will bargain collectively, upon request, with United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, AFL, as the exclusive representative of all employees in the bargaining unit described herein, with respect to rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees, excluding office and clerical employees, guards, watch-

men, professional employees, and supervisors as defined in the Act.

I Will Not question my employees concerning their union membership, sympathies, or activities, threaten them with reprisals for engaging in union activities, or penalize them because of their union membership or activities.

I Will Not promise my employees benefits if they repudiate United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, AFL, or support Rehrig Employees Benefit Group.

I Hereby Disestablish Rehrig Employees Benefit Group as the representative of any of my employees for the purpose of dealing with me concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, and I will not recognize it, or any successor thereto, for any of the above purposes.

I Will Not dominate or interfere with the formation or administration of, or contribute financial or other support to, Rehrig Employees Benefit Group, or any other labor organization of my employees.

I Will Not give effect to any and all arrangements and agreements with Rehrig Employees Benefit Group, or any successor thereto.

I Will Not in any other manner interfere with, restrain, or coerce my employees in the exercise

of the right to self-organization, to form labor organizations, to join or assist United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, AFL, or any other organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

MURIEL H. REHRIG,
doing business under the firm name and style of
Rehrig-Pacific Company (Employer)

Dated.....

By.....
(Representative) (Title)

This Notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service by Mail attached.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MURIEL H. REHRIG, d/b/a REHRIG-PACIFIC COMPANY,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "In the Matter of Muriel H. Rehrig, d/b/a Rehrig-Pacific Company and United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, AFL," Case No. 21-CA-1053 before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Howard Myers Trial Ex-

aminer for the National Labor Relations Board, dated August 27, 1951.

(2) Stenographic transcript of testimony taken before Trial Examiner Myers on August 27, 28, 29, 30, September 10, 11, 12 and 13, 1951, together with all exhibits introduced in evidence, also rejected exhibits.

(3) Copy of Trial Examiner Myers' Intermediate Report and Recommended Order, dated October 12, 1951, (annexed to item (9) hereof); order transferring case to the Board, dated October 12, 1951, together with affidavit of service and United States Post Office return receipts thereof.

(4) Respondent's letter, dated October 16, 1951, requesting extension of time to file exceptions.

(5) Copy of Board's telegram, dated October 24, 1951, granting all parties extension of time to file exceptions.

(6) Respondent's telegram, dated November 23, 1951, requesting further extension of time to file exceptions.

(7) Copy of Board's telegram, dated November 26, 1951, granting all parties further extension of time to file exceptions.

(8) Respondent's statement of exceptions to the Intermediate Report and Recommended Order, received December 5, 1951.

(9) Copy of Decision and Order issued by the National Labor Relations Board on May 19, 1952, with Intermediate Report and Recommended Order annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 10th day of December, 1952.

/s/ OGDEN W. FIELDS,
Executive Secretary
[Seal] NATIONAL LABOR RELATIONS BOARD

Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-1053

In the Matter of

REHRIG-PACIFIC COMPANY
and
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, WOODWORKERS LOCAL 530, AFL.

TRANSCRIPT OF PROCEEDINGS

Room 602, 111 W. Seventh St., Los Angeles, Calif.
Monday, August 27, 1951

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

Before: Howard Myers, Trial Examiner.

Appearances:

George H. O'Brien, 111 West Seventh St., Los Angeles, Calif., appearing on behalf of the General Counsel for the National Labor Relations Board.

Joe Orloff, 756 South Broadway, Los Angeles, Calif., appearing on behalf of Rehrig-Pacific Company.

Arthur Garrett, Room 602, 538 Maple Ave., Los Angeles, Calif., appearing on behalf of United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, A.F.L. [1*]

Edward I. Gorman, Room 920, 610 South Broadway, Los Angeles, Calif., appearing on behalf of Rehrig-Pacific Employees Benefit Group. [2]

Proceedings

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. O'Brien: No, I am waiting for Mr. Garrett, who represents the charging union.

Trial Examiner Myers: Shall we wait a while?

Mr. O'Brien: If you don't mind, Mr. Examiner.

Mr. Gorman: Pending that, my name is Edward Gorman, and Friday afternoon a petition was filed on behalf of the 60 members—or, persons working for Rehrig-Pacific for certification.

Trial Examiner Myers: Supposing we wait for Mr. Garrett. Whom does he represent?

Mr. O'Brien: The charging union in this case.

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* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Trial Examiner Myers: Very well. I think we had better wait for Mr. Garrett.

(Short recess.)

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. O'Brien: Yes.

Trial Examiner Myers: I would like to announce this is a formal hearing before the National Labor Relations Board in the matter of Rehrig-Pacific Company and United Brotherhood of Carpenters and Joiners of America, Woodworkers Local 530, AFL, Case No. 21-CA-1053. [4]

The Trial Examiner appearing for the National Labor Relations Board is Howard Myers.

Will counsel and the other representatives of the parties please state their appearances for the record?

Mr. O'Brien: Appearing on behalf of the General Counsel for the National Labor Relations Board is George H. O'Brien. My address is care of the National Labor Relations Board, 111 West Seventh Street, Los Angeles, California.

Mr. Garrett: For the charging party, Arthur Garrett, attorney. 538 Maple Avenue, Los Angeles 13; Room 602. Telephone number, MAdison 9-1657.

Mr. Orloff: For the employer Rehrig-Pacific Company, Joe Orloff, 756 South Broadway, Room 507; TRinity 9857.

Trial Examiner Myers: Does anyone else desire to have their appearance noted upon the record?

Mr. Gorman: Yes. I am appearing for the 60 employees of Rehrig-Pacific.

Trial Examiner Myers: Are you moving to intervene?

Mr. Gorman: Yes. We have already filed a petition.

Trial Examiner Myers: Will you kindly make your motion in writing and serve copies on the other parties?

Mr. Gorman: May I state my position for a moment? We have filed a petition for certification.

Mr. O'Brien: Could we have this gentleman identified on the record? [5]

Trial Examiner Myers: Will you state your appearance?

Mr. Gorman: Edward I. Gorman, 920 Walter P. Story Building, 610 South Broadway; VAndyke 6443.

Friday afternoon, on behalf of the employees, a petition for certification was filed.

Trial Examiner Myers: By whom?

Mr. Gorman: By the Rehrig employees benefit group. We feel that the proper parties here should be, for a final determination of this matter, the Teamsters Union and — the Carpenters and the group which I represent, who have petitioned for certification.

In other words, our position is that the outcome of this matter may be a mute question, pending the determination of the right of representation between our groups.

Trial Examiner Myers: How long will it take you to prepare a written application for interven-

tion, in accordance with the Rules and Regulations of the Board?

Mr. Gorman: Well, I think I would need——

Trial Examiner Myers: First of all, I will ask whether there is any objection to the motion.

Mr. O'Brien: Yes, Mr. Examiner.

Trial Examiner Myers: I think you had better get your papers in order, then, Mr. Gorman.

Mr. Gorman: With some time we can prepare a formal application for intervention. [6]

Trial Examiner Myers: How long do you want?

Mr. Gorman: I think possibly two weeks would be sufficient.

Mr. O'Brien: Mr. Examiner.

Mr. Gorman: I just got into this picture last Wednesday. It is evident I haven't had sufficient time, except to file the petition for certification. I am willing to comply with anything that is——

Trial Examiner Myers: All I want you to do is to submit in writing your application for intervention. Then at that time I will be able to ascertain whether you have any grounds for intervention, and if so, then I will be in a position to pass upon your application for an adjournment in order to get ready to prepare yourself with respect to the issues involved in this proceeding.

How long will it take you, 15 minutes? It doesn't have to be typed. I will allow you to submit the application to the other parties, just one copy, and they can circulate the copy.

I think it should be in writing, in order to protect your interests. If you want 20 or 30 minutes——

Mr. Gorman: Would it be possible to state the interest orally?

Trial Examiner Myers: I am trying to advise you what is best for your own protection and the protection of your [7] clients.

Mr. O'Brien, will you let me have a copy of the Rules and Regulations?

Mr. O'Brien: Yes. I wouldn't have any objection to giving Mr. Gorman half an hour to write out his motion in longhand, so we can see what his position is here.

Trial Examiner Myers: I just want to point out the Rule to Mr. Gorman, so he can familiarize himself. Do you know the Rule, Mr. Gorman?

Mr. Gorman: I am not too well acquainted with them, no. I think I know the one the Court is referring to.

Trial Examiner Myers: Do you know that one? That is the only one I want to call to your attention at the present time. Do you know it, offhand? I mean what section it is.

Mr. Gorman: No, I don't think so. 102.57, I believe, applies to an oral statement; page 20.

Trial Examiner Myers: I think you had better make your motion in writing, even though you may do so orally, in order to protect your interests. I will give you half an hour and if you need more time, let me know, and I will give you more time.

Mr. Gorman: All right. I will prepare it. I won't have time to dictate it.

Trial Examiner Myers: No. I say to write it

out in longhand. If you need more time, let me know and I will be [8] glad to give you more.

Mr. Gorman: Thank you very much.

Trial Examiner Myers: We will stand adjourned now until 10:45.

(Short recess.)

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. O'Brien: General Counsel is ready.

Trial Examiner Myers: Mr. Gorman, did you have sufficient time to prepare your written motion?

Mr. Gorman: Yes. Thank you very much for the opportunity.

Trial Examiner Myers: Have you shown it to counsel?

Mr. O'Brien: I have seen it. Mr. Gorman had it ready in adequate time, but other people were out.

Trial Examiner Myers: Mr. Garrett, have you seen the petition?

Mr. Garrett: Just a moment.

Trial Examiner Myers: Have you seen the petition, Mr. Garrett?

Mr. Garrett: Yes, I have read the petition.

Trial Examiner Myers: Mr. Orloff, have you seen it?

Mr. Orloff: I have seen it.

Trial Examiner Myers: Do you want to be heard in support of your application, Mr. Gorman?

Mr. Gorman: Yes. Under Section 7 of the Act the employees [9] have a right to, as I read it, self-organization and to appoint whatever organization

they see fit, including a self-organization, to act as their bargaining agent.

From the facts as I have them, they have had such an association since about March of this year. That association has actually been its bargaining agent and its representative, and consists of all the employees which would properly come under the Act. That is, 60 out of 60 employees.

I think, therefore, we have a right in this matter to contest the petition of the applicants and attempt to have our own group certified as the proper representative.

Trial Examiner Myers: Is there any opposition or any objection to the application to intervene?

Mr. O'Brien: Yes, Mr. Examiner. This same matter has come up before the Board in several cases. I picked one out at random during the recess.

Calling attention of the Examiner to the matter of Tishomingo County Electric Power Association and International Brotherhood of Electrical Workers, Local 852, affiliated with the American Federation of Labor.

Trial Examiner Myers: What is the citation of that?

Mr. O'Brien: It is Volume 74 of the Decisions and Order of the National Labor Relations Board, page 864. In this case there was a complaint alleging refusal to bargain with the IBEW, and one of the employees, claiming to represent a group [10] of employees, sought leave to intervene.

The Trial Examiner denied the motion for inter-

vention and the Board holding that such denial was proper, said at page 866:

"The Trial Examiner denied Employee Deaton's motion to intervene, formally, in behalf of the employees now working in the unit. He stated, however, that Deaton could present any matter material to the case, at the proper time, in the course of the proceedings. Deaton asserted no interest in either supporting or opposing the allegations of the complaint as to the respondent's unfair labor practices but, rather, indicated that the employees (mistakenly) believed that the hearing was preliminary to an election to be ordered by the Board as a means of determining a question of representation. The purpose of their intervention, he revealed, was to register their opposition to the union. This purpose was adequately served by their petition, which was admitted in evidence and which we have considered as relevant to our remedial order herein. It is clear, from the above, that no prejudice can have resulted from the Trial Examiner's refusal to permit the employees whom Deaton represented to become formal parties to the proceeding."

Then citing the matter of John J. Oughton, et al., vs. NLRB, 118 F.(2d) 486, at page 495. That is a Third Circuit case. [11]

Certiorari in the Oughton case was denied by the United States Supreme Court in Vol. 315 of the U. S. Reports, at 797.

Trial Examiner Myers: Does it cite the Semi Steel case?

Mr. O'Brien: I don't see the citation there, Mr.

Examiner. As I say, I didn't make any exhaustive research.

Trial Examiner Myers: The Oughton case is my case and the Semi Steel case is my case. What is your position, Mr. Garrett?

Mr. Garrett: The charging party opposes the granting of the motion to intervene. The intervener, in the face of his own showing, is not a proper party here nor would the issues which he apparently intends to raise by his intervention be material here, any of them.

His intervention is now based upon a written showing. He has no file here. It shows on its face he hasn't a basis for intervention in this kind of a case.

I will say that if he can show a representation petition on file at this time, which I don't believe he can, he should be allowed to offer it here.

Trial Examiner Myers: I didn't get the last part of your statement, Mr. Garrett.

Mr. Garrett: I will say if this intervener has a representation petition on file, as against this employer, which it does not appear from the face of his motion he has, and which I state, on the basis of my information, he has not, but [12] if the intervener had such a representation petition on file—

Trial Examiner Myers: You mean at the present moment?

Mr. Garrett: At the present moment.—I think it ought to be taken in by the Trial Examiner as part of the record, for the guidance of the Board

in determining the remedial action which will be taken.

Trial Examiner Myers: You mean at the present moment?

Mr. Garrett: At the present moment. I think it ought to be taken in by the Trial Examiner as part of the record for the guidance of the Board in determining the remedial action which will be taken.

Trial Examiner Myers: Well, I understand from the motion papers and from what Mr. Gorman said that he filed a petition with the Board on last Friday, August 24th.

Mr. Garrett: I think perhaps I had better explain that. I think perhaps Mr. Gorman has mistaken the scope of the word "petition."

I think when he mentioned a petition in his motion in intervention he thought that that word encompassed a charge, whereas, some of the rest of us use the term "petition" as relating to the representation proceedings only. I think what he filed was a charge against the charging party, on behalf of this proposed intervener.

Trial Examiner Myers: What did you file, Mr. Gorman?

Mr. Gorman: Actually there are two documents filed. Mr. [13] Garrett is correct in saying that one of those is a charge against the charging party and the second is a petition for certification. Those both were filed Friday.

Trial Examiner Myers: What is your position, Mr. Orloff?

Mr. Orloff: Our position is this, Mr. Examiner:

There are now apparently two groups, each of whom seek to be recognized as a representative of the employees. Our position is that a proceeding should be had, or whatever the proceeding that may be had should, at least, determine if it should be determined that we are required to bargain with anyone, that it should determine who we should bargain with. That determination is, in my opinion, one that cannot be made in the absence of two conflicting persons or groups seeking to be named as the representative of the employees for the purpose of bargaining.

I believe that any evidence that is available, any proceedings that are pending, should either be consolidated into a single hearing or the matter between the two conflicting parties, as to who has a right to represent the employees, be determined, because it might make the proceeding pending here moot.

In other words, if the Examiner were to find that the Woodworkers Local was not the bargaining agent for the employees, in a contest between the Rehrig benefit group, or, Rehrig employees benefit group, and hold that the Rehirg [14] employees benefit group was the bargaining agent, then a ruling in the matter now pending before this Court would be a moot question. There would be no point to it.

So it seems that we should have all of the matters entered into or, at least, consolidated, if not tried separately, at least consolidated so the entire matter could be heard.

I might say this: It occurs to me, at first blush, merely listening to the excerpt read by Mr. O'Brien, the case he has referred to is not in point. As I say, it is just listening to the one paragraph or so that he read, but it occurs to me that there are several points of distinction between that matter and what appears in this matter.

I am not familiar with the petition and the charge that have been filed. I haven't seen them. But my recollection of what was read by Mr. O'Brien was something to the effect that it was a proceeding involving a charge and not related to the—I don't have the exact language—but it was not related to a proceeding in which there was sought to be a certification of some other unit as a bargaining unit.

As I say, I haven't read the matter and I am trying to pick it up from a reading just had.

Trial Examiner Myers: Why don't you take a few moments and read it over carefully.

Mr. Orloff: I do think, in any event, the matter should be determined so that we know who we are to deal with. [15]

Trial Examiner Myers: While you are looking that over, we will take a short recess.

(Short recess.)

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. O'Brien: Yes.

Trial Examiner Myers: First of all, Mr. Gorman, what do you intend to bring out in case you are permitted to intervene?

Mr. Gorman: The intention, of course, is to seek a recognition, No. 1.

Trial Examiner Myers: That is not an issue before me now.

Mr. Gorman: Except in this respect, that an order in this matter, even though it is not a matter of certification, will in effect, force a bargaining between the petitioner here and the employer.

May I say this, as to the cases which I have read very briefly, that in all cases it seems, at least, prima facie, there was at least a duly constituted authorized representative.

In all those cases there was a minority group of employees seeking to file an intervention. It is not clear in the Tishomingo case what group they represented.

We allege affirmatively here in our petition that, No. 1, there was no authorized agent, no certified agent and no one [16] who represented the employees except a group—this is not the petition of an employee—but a position of what we allege. It is a group who has been representing the employees. I feel that an order pursuant to a hearing here may force a bargaining, if it goes that way, which would necessitate other types of proceedings to obtain certification. I feel the matter should be cleared up as between the competent representatives.

Trial Examiner Myers: As I understand, you are trying to show, or, it is your intention to show that the charging party in this proceeding is not now and never has been the exclusive collective bar-

gaining representative of the employees involved. Is that it?

Mr. Gorman: Yes, except we go a little bit further. Your word "exclusive"—we say they have never represented them in any manner, shape or form.

Trial Examiner Myers: I am just using the word of the statute when I use "exclusive."

Mr. Gorman: My point being there has never been a bargaining agent at any time for any purpose, except the employees group which I represent.

Trial Examiner Myers: Well, isn't that just what the employers will endeavor to show, that the charging union was not at any time—and that it is not now—the collective bargaining representative of the employees involved? [17]

Mr. Gorman: Yes, but a determination of that issue—in other words, I don't know what the employer's evidence is going to be. At this stage you have a determination which might or might not—but there is a possibility—would force the employees to bargain, if their charge is substantiated, to recognize this group as its bargaining agent.

Trial Examiner Myers: Well, that is not in the pleadings and there can't be an order to that effect, because that is not an issue in this case.

Mr. Gorman: If a restraining order is ordered restraining them from the unlawful practice, which is the failure to bargain, then, although there may not be a direct order or anything similar to a certification, it would, in effect, allow them to come

within the court and not violate the order here, and force them to bargain.

Trial Examiner Myers: The only order the board can make is an order directing the employer to bargain with the union.

Mr. Gorman: Yes.

Trial Examiner Myers: That is, the charging union. Or an order dismissing the complaint as to the allegations of refusal to bargain.

The employer in this case has denied that the charging union is or ever has been, during all the times material here, the duly authorized agent. In other words, they claim that the charging party never represented the majority of [18] the employees in the bargaining unit. That is just what you want to show, isn't it?

Mr. Gorman: Well, we want to show, with no connection with the employer—we are not particularly disturbed at what may happen to the employer, except we don't want a recognition——

Trial Examiner Myers: This case is against the employer and nobody else.

Mr. Gorman: But the effect of an order and the possibilities admitted, of course, is that an order in favor of the petitioning party involved here would result in forcing the employer to bargain with them, and we are alleging that we have been the duly constituted bargaining agent since March of this year. And that we have filed a petition for certification, so we would be in a position of representing the wishes of the employees, and yet the employees being represented by another group because of the restraining

order or the order forcing the employer to bargain with the petitioner here.

Trial Examiner Myers: The board can't make such an order. The board can either direct the employer to bargain with the union or an order be made dismissing the complaint as to the 8(a)(5) allegations of the complaint. It cannot, under the circumstances which have been joined in this proceeding, direct the employer to bargain with anybody other than the [19] charging union.

Mr. Gorman: I realize that. That is the reason for this petition, to clear the matter up with one hearing, if possible, so that we may determine the issues and find out who is or should be the duly certified representative.

Trial Examiner Myers: The board couldn't do it if I allowed you to intervene, because that is not before the board. We wouldn't let you prove in this proceeding you represented the majority. All we could let you do is prove the charging union is not the representative of the majority and was not at the time of the refusal to bargain, the alleged refusal to bargain.

Mr. Gorman: Then at this time may I move for a consolidation of the matter in which we have filed a petition for certification? Wouldn't that dispose of the matter with one hearing?

Trial Examiner Myers: Well, it is not within my power to grant a consolidation. The act doesn't permit it.

Now, will you offer this as a General Counsel's exhibit, please, the petition of the intervenor?

Mr. O'Brien: Mr. Examiner, I suggest that the document which Mr. Gorman presented this morning be identified as General Counsel's Exhibit 2.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.) [20]

Trial Examiner Myers: Are you offering the paper now?

Mr. O'Brien: I haven't yet offered General Counsel's Exhibit 1. However, I will offer General Counsel's Exhibit 2 at this time.

Trial Examiner Myers: Is there any objection to the petition going in evidence?

(No response.)

Trial Examiner Myers: Hearing no objection, the paper is received in evidence, and I will ask the reporter to please mark it General Counsel's Exhibit No. 2.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received in evidence.)

Trial Examiner Myers: Now, with respect to your motion to intervene, have you read the court's opinion—I think it is either the Sixth or Eighth Circuit—with respect to the Semi Steel Casting Company case?

Mr. Gorman: Yes.

Trial Examiner Myers: Isn't that case on all fours with the one at bar?

Mr. Gorman: No, I don't think so. In that case allegedly a certain amount of employees voted, there was an action——

Trial Examiner Myers: The only question that I have in mind with respect to that case is the petitioner's motion to intervene and my denial of that motion.

Mr. Gorman: But in that matter there were five employees, [21] which were a small fraction, and there the court, I think rightly, said the employees had no interest there, they weren't in a position where they said, "We are the representative." There were five employees. I think we have a different situation here.

Trial Examiner Myers: Let me show you what the court said. You don't have the court's opinion.

Mr. Gorman: Here it is here. In our situation I represent a group which has been the bargaining representative; not the employees, but a representative of the employees.

Trial Examiner Myers: We will read from where I marked an X, starting with the words, "The courts have uniformly held that in a proceeding under this section of the act"—meaning Section 10(b) —"against an employer on the charge of an unfair labor practice, the employees are not necessary parties." Have you read that part?

Mr. Gorman: Yes.

Trial Examiner Myers: What is your point? What is your position?

Mr. Gorman: My point is that there is no question about that. This is a charge against the company. The employees, as such, have no interest in it.

My point is this: We have an interest to this ex-

tent, that we allege that we have been representing the employees [22] as a separate group.

Now, our interest is this: That if we have been representing them and we could substantiate that, an order for the petitioner here would, in effect, wipe out what we have been doing as a fully constituted representative.

We are not simply the employees. We are alleging to be the representative, duly constituted and authorized, and I think that our interest is to have a determination as to whether we are and should be certified or not; as employees we would have no interest in it.

Trial Examiner Myers: Well, I will deny your motion with this understanding, that I will allow you to present any matter material to the case at the proper time, in the course of these proceedings.

Of course, if you want to sit here and assist or be associated with Mr. Orloff, you may do so.

Mr. Gorman: No. Our interest, as a matter of fact, may be antagonistic. Our interests at some point here, certainly, are going to be antagonistic to each other. They may take the position they refuse to recognize any group, or my group.

Trial Examiner Myers: That would not be before me, anyway.

Mr. Gorman: I am just stating my reason, if the Court please.

Trial Examiner Myers: With the understanding, as I [23] stated, the motion is denied.

You may proceed, Mr. O'Brien. Just a minute. Before you proceed, I would like to state for the

record that the official reporter makes the only official transcript of these proceedings.

Citations in briefs, based upon the record, directed to the Trial Examiner or to the board, must cite the official transcript in all references to the record. The board will not certify any transcript other than the official transcript for use in any court litigation.

It may become necessary to make corrections in the record during the hearing. If so, the party desiring the correction will submit the suggested corrections to the other parties in writing. When this has received their written approval it will be submitted to the Trial Examiner. In the event the parties are unable to agree upon the proposed corrections, the Trial Examiner will then consider motions to correct the record.

If the parties are unable to agree upon the proposed corrections before the close of the hearing, but have entered into a written stipulation concerning such matters after the close of the hearing, but before the transfer of the case to the board, such stipulations should be addressed to the Trial Examiner, in care of Associate Chief Trial Examiner William E. Spencer, whose address is Room 512 Pacific Building, [24] 821 Market Street, San Francisco 3, California.

After the transfer of the case to the board, all communications to correct the record should be directed to the board itself. Concise statements with respect to objections will be permitted. All requests

to go off the record are to be directed to the Trial Examiner and not to the official reporter.

The Trial Examiner will allow an automatic exception to all adverse rulings, and upon appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

At the close of the hearing the Trial Examiner may request counsel or representatives of the parties to argue orally. The oral argument will be part of the stenographic report of the hearing.

Any party shall be entitled to, upon request before the close of the hearing, file a brief or proposed findings of fact and conclusions of law, or both, with the Trial Examiner within the time to be fixed by the Trial Examiner at the close of the hearing. All requests to extend the time as fixed shall be directed to Mr. Spencer, the Associate Chief Trial Examiner, not later than three days prior to the expiration date.

Five copies of briefs or proposed findings of fact or conclusions of law shall be directed to the Trial Examiner, in care of the Associate Chief Trial Examiner Spencer. Copies [25] of briefs and proposed findings of fact and conclusions of law must be served upon the other parties and proof of service must accompany all briefs and findings of fact and conclusions of law with the Trial Examiner.

During the course of the hearing the Trial Examiner may ask questions of the various witnesses. The Trial Examiner wants counsel to feel free to object to any of his questions if they think the questions are improper, in the same manner and with the

same freedom as if the questions were propounded by counsel.

Mr. O'Brien, you may proceed.

Mr. O'Brien: Mr. Examiner, I will ask the reporter to mark for identification General Counsel's Exhibits 1-A to 1-F, inclusive.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 1-A to 1-F, inclusive, for identification.)

Mr. O'Brien: I have had the following exhibits marked for identification:

As General Counsel's Exhibit 1-A, the Charge filed March 5, 1951, docketed as Case No. 21-CA-1053;

As General Counsel's Exhibit 1-B, an Affidavit showing that a copy of the Charge was sent by registered mail on March 5, 1951, to Rehrig-Pacific Company, 3726 East Twenty-sixth Street, Los Angeles, California; and to which is [26] attached a postal return receipt card indicating that a copy of the Charge was received by Rehrig-Pacific Company on March 6, 1951;

As General Counsel's Exhibit 1-C, a Complaint issued June 15, 1951;

As General Counsel's Exhibit 1-D, a Notice of Hearing setting the hearing in the instant matter for this date, time and place;

As General Counsel's Exhibit 1-E, an Affidavit showing that a copy of the Complaint, Notice of Hearing and Charge was sent by registered mail on June 15, 1951, to Rehrig-Pacific Company, to the United Brotherhood of Carpenters and Joiners of

America, and by ordinary mail to Joe Orloff, Esq., and Arthur Garrett, Esq.;

As General Counsel's Exhibit 1-F, the Answer of Rehrig-Pacific Company filed June 26, 1951;

I offer General Counsel's Exhibits 1-A through 1-F in evidence.

Trial Examiner Myers: Gentlemen, after you examine the proposed exhibits, will you kindly state for the record whether you have any objections to the papers going in evidence?

Mr. Garrett?

Mr. Garrett: No objection.

Trial Examiner Myers: Mr. Orloff? [27]

Mr. Orloff: We will object to the introduction of Exhibit 1-A for identification upon the ground that it is merely hearsay.

Trial Examiner Myers: What is Exhibit 1-A?

Mr. Orloff: The Charge.

Mr. O'Brien: 1-A is the Charge.

Mr. Orloff: I mean it is a part of the record, I guess, but the contents of it are statements made by particular individuals and the testimony from those individuals would be the testimony that would be proper in the case, rather than a——

Trial Examiner Myers: These papers are only offered in evidence as pleadings and not to prove that the statements contained in the papers are true and correct.

Mr. Orloff: As a pleading, I have no objection to it, but as evidence, is what my point is. If it is requested to be introduced as evidence, we do object. As a pleading I don't have any objection to it.

Trial Examiner Myers: It is only going in as a pleading.

There being no objection, the papers are received in evidence, and I will ask the reporter to kindly mark them as General Counsel's Exhibits 1-A through and including 1-F.

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A to 1-F, inclusive, for identification were received in evidence.)

[Printer's Note: Exhibit 1-A is set out at page 1; 1-C at page 4; 1-F at page 9.]

Trial Examiner Myers: Gentlemen, are there any motions [28] addressed to the pleadings?

Mr. O'Brien: Yes, Mr. Examiner. I call the attention of the Examiner to the fact that the Answer does not refer in any way to Paragraphs 1, 2, 3, and 4 of the Complaint. The board's rules——

Trial Examiner Myers: Then they are admitted.

Mr. O'Brien: I want to call attention to that fact. And I move the Trial Examiner at this time for a finding that Paragraphs 1, 2, 3, and 4 of the Complaint are true, so it won't be necessary for me to meet that issue at the hearing.

Trial Examiner Myers: What about that, Mr. Orloff?

Mr. Orloff: I think by a failure to deny they are automatically admitted. I see nothing new about it.

Trial Examiner Myers: Very well.

Mr. O'Brien: Mr. Cordil.

Trial Examiner Myers: Mr. Garrett, have you any motions addressed to the pleadings?

Mr. Garrett: No.

Trial Examiner Myers: Mr. Orloff?

Mr. Orloff: No motions.

Trial Examiner Myers: Kindly call your first witness, Mr. O'Brien.

Mr. O'Brien: Mr. Cordil.

Trial Examiner Myers: Will you step forward, sir and be sworn. [29]

NICK CORDIL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Nick Cordil; C-o-r-d-i-l.

Trial Examiner Myers: Where do you live, Mr. Cordil?

The Witness: You want my——

Trial Examiner Myers: Home address.

The Witness: 9516 Cattarougus, Los Angeles 34.

Trial Examiner Myers: You may be seated, sir.

Mr. O'Brien, you may proceed with the examination of Mr. Cordil, who has been duly sworn.

Q. (By Mr. O'Brien): What is your business address, sir?

A. My business address is Room 602, 538 Maple Avenue, Los Angeles 13, California.

Q. What is your business or occupation?

(Testimony of Nick Cordil.)

A. Business representative of the Los Angeles County District Council of Carpenters.

Q. Is that the charging union in this case?

A. Yes.

Q. What is your connection with the charging union in this case?

A. All unions of our international are affiliated with the District Council of Carpenters, and I am assigned to assist [30] Local 530 in organizing activities.

Q. What was your first contact with Rehrig-Pacific Company in your official capacity?

A. The first contact with Rehrig-Pacific Company was the latter part of January of this year, I believe, on the twenty-ninth. Mr. McKinzie and I——

Q. Who is Mr. McKinzie?

A. He is business representative of Local 530.

Trial Examiner Myers: What is his first name?

The Witness: Robert R. McKinzie. We went into the office of the Rehrig-Pacific Company after meeting with the employees at noontime, and there introduced ourselves to a Mr. Bud Rehrig.

Q. (By Mr. O'Brien): What took place?

A. At that time we told Mr. Rehrig that we represented a majority of his employees and that we wished to bargain with him, to make a contract covering wages and hours and covering the employees in his operation.

Q. What did he say?

A. He said he met with some of the employees

(Testimony of Nick Cordil.)

and that he knew we represented a majority of the employees; he had found that out. Before he would give us an answer, one way or the other, he wanted to check up on the facts further. That was the meat of the conversation at that time.

Q. Do you recall any more of the conversation?

A. Yes. We told him that this was oral, that later that day we would see that a formal request to bargain was delivered to him, sent to him, so that it would be on record officially.

We went into some discussion about wage rates and——

Mr. Orloff: I object to that as being the conclusion of the witness. I would like to have the conversation, if he is going to give a conversation.

Trial Examiner Myers: Tell us what was said.

The Witness: Well, there was—the discussion lasted for some time. One of Mr. Rehrig's statements was that he felt that he couldn't pay union wages on his operation. And there was a lengthy discussion on what our wage rates were and——

Mr. Orloff: Same objection, if the Court please.

Trial Examiner Myers: Do you want to go into all that, what he said about the rate?

Mr. Orloff: I don't want his interpretation of what was said.

Trial Examiner Myers: All right. Tell us what you told him about the wage rates, and all that. Did you tell him the rate?

The Witness: He asked what wage rates we would expect to collect at his operation.

(Testimony of Nick Cordil.)

Trial Examiner Myers: What did you tell him?

The Witness: I told him that we would expect to collect [32] the exact wage scale we were collecting at our other box factories, such as Harbor Box and El Rey Box, specifically. And the amounts did come into it.

I mentioned that we at that time had $1.32½ low, and he said that he was only paying $1.00, I believe, at the time, and could not afford to pay the prevailing wage rate in the industry.

That is approximately the meat of it.

Q. (By Mr. O'Brien): Is that all you recall of the conversation?

A. There was other conversation. That was approximately all I can recall of it. There was some reference to the El Rey Box Company, where he previously had owned some land over there, but—our bargaining there——

Q. What did you do next with reference to Rehrig-Pacific?

A. I immediately went back to the office, where I dictated a demand for recognition which, I believe, Mr. McKinzie delivered in person later that day.

Mr. Orloff: I ask that be stricken as being conjectural on his part, and hearsay.

Trial Examiner Myers: Motion denied.

Mr. O'Brien: Please mark this for identification as General Counsel's Exhibit 3.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3 for identification.) [33]

(Testimony of Nick Cordil.)

Mr. O'Brien: You should have the original in your file, Mr. Orloff?

Mr. Orloff: Beg pardon?

Mr. O'Brien: You should have the original in your file.

Q. (By Mr. O'Brien): I show you General Counsel's Exhibit 3 for identification, and ask you if that is the letter which you say you dictated?

A. Yes, it is.

Q. You notice it bears the date January 31, 1951. Does that refresh your recollection as to the date when you talked to Mr. Rehrig?

A. Yes. It was that same day this letter was dictated. I said the twenty-ninth, but it must have been the thirty-first. I know it was right along in there.

Mr. O'Brien: There will be further identification of General Counsel's Exhibit 3, Mr. Examiner.

Q. (By Mr. O'Brien): What did you do next with regard to Rehrig-Pacific?

A. We continued from time to time in those few days following this to meet with the employees, and there was one other time that myself and Mr. McKinzie and Mr. Starkey——

Q. Will you identify Mr. Starkey?

A. He was an organizer—he is an organizer for Woodworkers Local 530. And Mr. A. K. Rife, who was at that time an organizer for Woodworkers Local 530—we went into Mr. [34] Rehrig's office and had a short talk with him. That was two or three days after this. I don't recall very much of that conversation, except that Mr. Rehrig had told

(Testimony of Nick Cordil.)

us basically at that time that he still hadn't made up his mind what he was going to do, one way or the other. I would put that about three or four days after this first time.

Q. What did you next do with regard to Rehrig-Pacific?

A. Well, several days later a phone call was received at the Woodworkers Local 530, and at that time the girl informed the secretary in their office that——

Mr. Orloff: Just a minute, Mr. Examiner.

Trial Examiner Myers: Don't tell us about any other conversation.

The Witness: Well, let me put it this way. At that time the secretary of the Woodworkers Local 530 informed us she had receive the message.

Mr. Orloff: Objected to what she informed them as being hearsay.

Trial Examiner Myers: I will sustain the objection.

Mr. O'Brien: Mr. Examiner, this is an official of the union and he is entitled to say what the intercommunications were which caused him or may have caused him to take action in the future.

Trial Examiner Myers: Pursuant to a talk with your secretary, did you do certain things—that is, the young [35] lady you just referred to as a secretary?

The Witness: Pursuant to my talk with the secretary in our office, we then filed for an election before the National Labor Relations Board.

(Testimony of Nick Cordil.)

Q. (By Mr. O'Brien): Did you have any further conversation with Mr. Rehrig?

A. No, I did not.

Q. Or with any official of the Rehrig-Pacific Company? A. No.

Mr. O'Brien: Those are all the questions I have.

Trial Examiner Myers: Mr. Garrett, have you any questions to ask the witness?

Cross Examination

Q. (By Mr. Garrett): Without telling me what it was, will you tell me whether or not this conversation that you had with the secretary in Local 530 related to a message which had been received at that office? A. Yes, it did.

Q. By her? A. By her.

Q. Is that young lady still employed by the local union? A. She is.

Q. What is her name? A. Fay Shapiro.

Q. Fay Shapiro? [36] A. Yes.

Q. Did this message that she told you she had received and after which message you filed a representation petition, did that message come from any of the people concerned in this organizing——

Mr. Orloff: Objected to as calling for hearsay.

Trial Examiner Myers: Overruled.

Mr. Orloff: He couldn't possibly know who it came from, unless she told it to him. That is the whole point.

Trial Examiner Myers: Overruled. You filed a petition, didn't you?

(Testimony of Nick Cordil.)

Mr. Garrett: I guess we will have to put her on. We will offer to show by this hearsay what we can show by bringing the girl in.

Trial Examiner Myers: You had better bring her in, if he is going to object.

Mr. Garrett: Just one other question.

Q. (By Mr. Garrett): Did the message she had received and that you were notified of concern this organizing attempt that was being made at Rehrig-Pacific? A. Yes, it did.

Mr. Garrett: That is all. Nothing further.

Trial Examiner Myers: Mr. Orloff, do you have any questions?

Q. (By Mr. Orloff): Mr. Cordil, you testified to a conversation [37] with Mr. Bud Rehrig on, roughly you said, or about January 29th, and then later the 31st. Who was present at that conversation?

A. Mr. McKinzie and myself, and Mr. Rehrig. I don't believe there was anyone else out of the plant at that time.

Q. No one else, just the three of you?

A. Just the three of us.

Q. This later conversation you had some four or five days after the thirty-first of January with Mr. Bud Rehrig, who was present at that conversation?

A. There were four of us. Myself, Mr. McKinzie, Mr. Rife and Mr. Starkey, and the office manager or man of Mr. Rehrig; I don't know his name.

Q. Were you introduced to him? A. Yes.

(Testimony of Nick Cordil.)

Trial Examiner Myers: Mr. Starkey, who is he?

The Witness: He is an organizer for Woodworkers Local 530.

Trial Examiner Myers: What is his first name?

The Witness: I don't know. May I ask him?

Trial Examiner Myers: No.

Q. (By Mr. Orloff): Anyone else?

A. That is all I can recall being present at that time.

Q. Did you personally talk with any of the employees at the plant? [38]

A. Yes, quite a few of them.

Q. You talked with quite a number of them?

A. Yes.

Q. Over a period of how long a time?

A. Over a period of a month.

Q. About a month? A. Yes.

Q. Is that prior to the thirty-first of January?

A. It was maybe a week prior, most of it.

Q. About a week before the thirty-first and then continuing afterwards? A. Yes.

Q. You came back into the plant for approximately three or more weeks after the thirty-first of January? A. That is correct.

Q. And talked to employees? A. Yes.

Q. Were you ever denied admission into the plant, permitted to talk—— A. No.

Q. You had free access into the plant?

A. I had free access.

Q. And talked to any of the employees you wanted to? A. That is correct.

(Testimony of Nick Cordil.)

Q. Both during working hours and in off hours?

A. I have never talked to anybody during working hours.

Q. In other words, the conversations you had with the employees at the plant were all during noon hours or recess periods or something of that sort? A. That is correct.

Q. About how many times would you say that you were present there?

A. Probably 15 different times, approximately.

Mr. Orloff: No further questions.

Trial Examiner Myers: Mr. O'Brien, do you have any redirect examination?

Mr. O'Brien: No, Mr. Examiner.

Trial Examiner Myers: Mr. Garrett?

Mr. Garrett: No further questions.

Trial Examiner Myers: You are excused, sir. Thank you very kindly.

(Witness excused.)

Trial Examiner Myers: We will stand adjourned now until 1:30.

(Whereupon, a recess was taken until 1:30 o'clock p.m.) [40]

After Recess

(Whereupon, the hearing was resumed, pursuant to the taking of the recess, at 1:30 o'clock, p.m.)

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. O'Brien: I am ready, Mr. Examiner.

Trial Examiner Myers: Ready, Mr. Garrett?

Mr. Garrett: Ready.

Trial Examiner Myers: Ready, Mr. Orloff?

Mr. Orloff: Ready.

Trial Examiner Myers: Mr. O'Brien, will you kindly call your next witness.

Mr. O'Brien: Mr. McKinzie.

ROBERT R. McKINZIE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Robert R. McKinzie.

Trial Examiner Myers: Mr. McKinzie, where do you live?

The Witness: 1921 Scott Avenue, L. A. 26.

Trial Examiner Myers: You may be seated, sir.

Mr. O'Brien, you may proceed with the examination of Mr. McKinzie.

Mr. Orloff: What is your first name, Mr. McKinzie? [41]

The Witness: Robert R.

Trial Examiner Myers: Who has been duly sworn.

Q. (By Mr. O'Brien): What is your business or occupation, sir?

A. I am president and business agent of Woodworkers Local No. 530, AFL.

(Testimony of Robert R. McKinzie.)

Q. What was your first contact with the employees of Rehrig-Pacific Company?

A. I appeared at lunch time while the boys were around the lunch wagon outside getting their lunch and buying pop, and talked to them about the union.

Q. That was approximately when, sir?

A. Well, I would say that it was approximately February, around the twenty-eighth or twenty-ninth, I mean January of 1951, around the twenty-eighth or twenty-ninth.

Q. Do you recall speaking specifically to any employee?

A. Yes, I recall speaking to two. I talked to a lot, but two I remember specifically.

Q. They were?

A. Eddie Baca and Frank Marquez, I think that is the way you pronounce his name, Frank Marquez.

Q. What did you do next?

A. Well, I talked to the boys about the union and told them that I had been sent by——

Mr. Orloff: I object to the conversation had between him [42] and the employees as being hearsay.

Trial Examiner Myers: What about that Mr. O'Brien?

Q. (By Mr. O'Brien): Do you know whether any supervisory employees were present?

Trial Examiner Myers: Did you withdraw that question? Do you withdraw your question?

(Testimony of Robert R. McKinzie.)

Mr. O'Brien: I want to know first whether any supervisory employees were present.

Q. (By Mr. O'Brien): Do you know.

A. I don't think they heard the conversation. They were circulating among the group.

Q. Was this outside the plant?

A. Yes, sir.

Q. About how far from the door?

A. Oh, maybe 10 or 12 feet.

Q. You don't know whether any supervisor heard your conversation or not?

A. No, I wouldn't be too sure.

Mr. O'Brien: I withdraw the pending question.

Q. (By Mr. O'Brien): What did you do next?

A. I followed the usual procedure, explained the benefits of organized labor to the boys.

Mr. Orloff: Objected to.

Trial Examiner Myers: Don't tell us what you said. It is immaterial, anyway. [43]

Q. (By Mr. O'Brien): After you met with those employees, what did you do next?

A. I went away and came back on the following Monday. At that time——

Trial Examiner Myers: Let's fix a date on that.

Q. (By Mr. O'Brien): Does the calendar help you, sir?

A. I think possibly that was around, I would say, possibly January 31st. I think I could fix the date of January 31st.

Trial Examiner Myers: Very well. That is 1951?

(Testimony of Robert R. McKinzie.)

The Witness: Yes, sir.

Q. (By Mr. O'Brien): What happened on that day?

A. Eddie Baca handed me a list of names signed by the employees, by which they had given me their names——

Mr. Orloff: Just a minute.

Trial Examiner Myers: Never mind, Mr. McKinzie. Just answer the questions directly.

Mr. O'Brien: Will you mark this for identification as General Counsel's Exhibit No. 4, two sheets.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

Mr. Garrett: Was No. 3 received?

Mr. O'Brien: I hadn't offered it.

Q. (By Mr. O'Brien): Showing you General Counsel's Exhibit 4 for identification, which is two sheets in pencil, is that what you referred to in your testimony? [44] A. Yes, sir.

Q. Who was present when Mr. Baca gave it to you?

A. Nick Cordil. I am not sure whether Fred Starkey stook beside us when this was handed to me. However, he was in the assembly and close, and I think he saw the list.

Q. Did that list remain in your custody until you turned it over to the labor board?

A. Yes, sir.

Q. When Mr. Baca gave you this list, what did he report to you?

(Testimony of Robert R. McKinzie.)

Mr. Orloff: Objected to, if the Court please, as calling for hearsay.

Trial Examiner Myers: I sustain the objection.

Mr. O'Brien: Was there a ruling, Mr. Examiner?

Trial Examiner Myers: I sustained the objection.

Q. (By Mr. O'Brien): What did you do next?

A. I informed Eddie, gave him application cards for members to sign, and told him that this was O. K.——

Mr. Orloff: Object to any conversation.

Trial Examiner Myers: Don't tell us what you said now, please. I have been trying to tell you that. Don't tell us what you said to these employees outside the presence of a representative of the employer.

Who is Eddie?

The Witness: Eddie Baca. He sits back there with the [45] checkered shirt on.

Trial Examiner Myers: You gave him a number of application cards?

The Witness: Told him that this was not——

Trial Examiner Myers: Don't tell us what you told him. What kind of application cards?

The Witness: They were our standard form aplication cards that we have.

Trial Examiner Myers: Local 530?

The Witness: From United Brotherhood of Carpenters and Joiners of America, Los Angeles District Council, that we are all affiliated with.

(Testimony of Robert R. McKinzie.)

Q. (By Mr. O'Brien): Were these cards returned to you?

A. Signed and returned to me, yes, sir.

Q. By whom?

A. Most of them by Eddie Baca. A few I picked up myself.

Q. Picked up yourself from whom?

A. The employees.

Q. Where? A. At the plant at noon times.

Trial Examiner Myers: The respondent's employees, the employer involved in this proceeding?

The Witness: No, sir.

Mr. Orloff: I didn't hear the question, your Honor.

Trial Examined Myers: Were they all employees of this [46] employer?

The Witness: Yes, sir.

Mr. O'Brien: Mr. Reporter, would you mark these applications for membership cards General Counsel's Exhibits 5-A through as many letters of the alphabet as are required in this sequence?

(Thereupon the documents above refered to were marked General Counsel's Exhibits Nos. 5-A through 5-TT for identification.)

Trial Examiner Myers: Go ahead.

Mr. O'Brien: Counsel for respondent is examining General Counsel's Exhibits 5-A through 5-TT.

Q. (By Mr. O'Brien): I hand you a block of 46 cards, and I ask you if those are the cards that you received from Mr. Baca or from individual employees of Rehrig-Pacific Company?

(Testimony of Robert R. McKinzie.)

A. I am sure they are.

Q. Did you make any changes on the face of those cards before you turned them over to the board? A. No.

Q. After receiving those cards, what did you do next? A. Contacted Mr. Bud Rehrig.

Q. How? A. In person in his office.

Q. When did you see him?

A. I didn't hear that question.

Q. When did you see him? [47]

A. At noon time on January 31, 1951.

Q. Who was present?

A. Nick Cordil and myself and Mr. Rehrig.

Q. What was the conversation?

A. We told him that we had a majority of his employees signed up and we wanted to represent them collectively in a union agreement.

Q. What did Mr. Rehrig say?

A. He said that he agreed with us that we had them, that we had done a bang-up job before he knew we were on the premises.

Trial Examiner Myers: Had what? He knew you had what?

The Witness: The employees signed up, that he had information that we represented the employees. He knew that we had those.

Q. (By Mr. O'Brien): Just tell us everything now, Mr. McKinzie.

Mr. Orloff: Just a minute. This matter refers to the list?

Mr. O'Brien: General Counsel's Exhibit 4.

(Testimony of Robert R. McKinzie.)

Mr. Orloff: General Counsel's Exhibit 4 for identification.

Q. (By Mr. O'Brien): Tell us everything you recall of that conversation in Mr. Rehrig's office.

A. Well, he merely admitted that he realized we represented the employees as we had told him, but he asked for time. He said we had done a bang-up job and come in before he knew it, [48] and he merely sparred for time.

Mr. Orloff: I ask the last be stricken as a conclusion.

Trial Examiner Myers: Just tell us what he said. Don't tell us your conclusions. Strike out the conclusion "sparred for time."

The Witness: Well, he asked for time to think it over.

Q. (By Mr. O'Brien): What was said by you and what did Mr. Cordil say?

A. Well, I think that was the gist of our conversation. We told him we represented the deal and he asked for a little further length of time to get himself together to see where he sat.

Q. Then what did you do?

A. Well, we talked and continued to meet with the boys every day and talk to them and——

Q. On this same day that you saw Mr. Rehrig, what did you do?

A. I went back to the office and Cordil and myself dictated a letter and I came back about 3:00 o'clock that afternoon and presented the letter.

Trial Examiner Myers: To whom?

(Testimony of Robert R. McKinzie.)

The Witness: I am not sure whether I presented it to the office manager or one of the girls. Mr. Rehrig was not there, but I left the letter.

Q. (By Mr. O'Brien): I show you General Counsel's Exhibit 3 for identification. Is that an original carbon of the letter [49] that you just described.

A. That is.

Q. And what did you do with the original?

A. I left it at Rehrig-Pacific Company.

Q. Was that on the date that this letter bears, January 31, 1951?

A. That is correct, about 3:00 o'clock in the afternoon.

Mr. O'Brien: I offer General Counsel's Exhibit 3 in evidence.

Trial Examiner Myers: Gentlemen, are there any objections to the paper going in evidence?

Mr. Orloff: Object to it upon the ground that there is no showing that it was ever delivered to anyone with authority to receive it.

Trial Examiner Myers: Do you dispute the receipt of that letter?

Mr. Orloff: Frankly, your Honor, I don't know whether it was or was not received.

Trial Examiner Myers: Will you try to ascertain?

Mr. Orloff: Mr. Rehrig is out of the city and I have been trying to reach him. We will withdraw the objection. He is not positive, but he believes that it was received.

(Testimony of Robert R. McKinzie.)

Trial Examiner Myers: And was received that day.

There being no objection, the paper is received in evidence, and I will ask the reporter to please mark it as [50] General Counsel's Exhibit No. 3.

(The document heretofore marked General Counsel's Exhibit No. 3 for identification was received in evidence.)

[See page 10.]

Q. (By Mr. O'Brien): Did you have a further conversation with Mr. Rehrig?

A. Yes, a few days later.

Q. Where was that? A. In his office.

Q. Who was present?

A. Myself, Nick Cordil, Fred Starkey, and Mr. Rehrig, and, I think, his office manager.

Trial Examiner Myers: His office manager?

The Witness: I think it was some gentleman he had there with him.

Trial Examiner Myers: Do you remember his name?

The Witness: No.

Q. (By Mr. O'Brien): What was the conversation?

A. It was again that we represented the people, and at that meeting Mr. Rehrig wanted time to talk to his attorney, and again he asked for time and did not deny at no time that we represented the people.

(Testimony of Robert R. McKinzie.)

Mr. Orloff: If the Court please, I will ask that the latter part be stricken.

Trial Examiner Myers: Strike it. You were only asked for what was said. Did he say anything about the majority? [51]

The Witness: No.

Trial Examiner Myers: Did he answer this letter of January 31st, or anybody on behalf of the company answer that letter of January 31st?

The Witness: Not by letter.

Q. (By Mr. O'Brien): Was there any reference to the letter in that meeting of February 2nd?

A. I don't believe there was.

Q. Just tell us everything you recall of the conversation.

Mr. Orloff: Just a minute, if the Court please. The last question referred to a specific date, which the witness has not referred to, and I think we ought to know if it was February 2nd. He asked about February 2nd. He said it was some few days later. If it was February 2nd I would like to have him testify that it was.

Mr. O'Brien: I misunderstood.

Trial Examiner Myers: Do you know when the meeting was?

The Witness: Your Honor, I didn't write the date down.

Mr. O'Brien: Thank you, Mr. Orloff. Now——

The Witness: At that meeting we practically referred to the same conversation we had in the first

(Testimony of Robert R. McKinzie.)

one, and Mr. Rehrig asked for time to consult his counsel.

Q. (By Mr. O'Brien): Was there any discussion of wages at this second meeting?

A. Yes, some. [52]

Q. What was it?

A. I think possibly we referred to the rates that we had in other factories, and he said those were too high, and that he——

Mr. Orloff: If the Court please, I will ask that that be stricken, as to what possibly was referred to.

Trial Examiner Myers: Tell us what you meant by the word "possibly." Do you remember what took place there?

The Witness: Not in actual words.

Trial Examiner Myers: I don't expect you to repeat the exact words. What was talked about? You just said there was some.

The Witness: We talked about wage rates in the other box factories and he said he couldn't pay those wage rates.

Trial Examiner Myers: "He" was Mr. Rehrig?

The Witness: That is right.

Trial Examiner Myers: Go ahead, Mr. O'Brien.

Q. (By Mr. O'Brien): Did he tell you why?

A. Well, he said he wasn't making any money, for one thing. I recall that, that he made that statement, and he gave a number of excuses.

Q. What were they?

A. Well, that he was not making any money,

(Testimony of Robert R. McKinzie.)

and the business was not going and that competition was bad, and he referred to a plant that had originally done the same work that he had that was in Oakland that was—had gone out of business, and said that he was in interstate commerce and that he was shipping his merchandise out of the state, and he referred to freight rates and a number of things similar to that.

Q. Is that all you remember of it now?

A. I would say about all.

Q. Do you recall him saying anything about what he would do if you pressed your demands?

Mr. Orloff: If the Court please, I let counsel go pretty far in the questions, virtually putting the words in the witness' mind and mouth. I don't think that he should be testifying as to each subject. I think the witness is here to do that.

Trial Examiner Myers: Are you objecting to the question?

Mr. Orloff: Objection to the question.

Trial Examiner Myers: That objection is overruled.

Will you read the question to the witness, Mr. Reporter.

(Question read.)

The Witness: Answer that?

Q. (By Mr. O'Brien): Yes.

A. He inferred that he might have to work only three days a week, and that if it became too severe they might even have to close the plant down completely.

(Testimony of Robert R. McKinzie.)

Q. How did the meeting wind up?

A. Well, he wanted to talk to his counsel, and then he said he would make another appointment with us and we would meet [54] again and—oh, his main objective was to ask for time.

Trial Examiner Myers: Never mind now.

Mr. Orloff: I ask that that be stricken.

Trial Examiner Myers: Strike it out. Will you please keep to the conversation. Never mind what your conclusions are.

Q. (By Mr. O'Brien): After this second meeting with Mr. Rehrig, did you have any communication from Rehrig-Pacific Company?

A. Yes. We received a telephone call telling us that he wanted a National Labor Relations Board election.

Q. How did you receive that message, sir?

A. His secretary phoned it to our secretary in our office. We got the call at the time that we came in.

Q. When you came back you were told that you received the message by someone in your office. Who was that?

A. Our secretary, Miss Shapiro.

Q. What was the message?

A. That the Rehrig-Pacific Company wanted a National Labor Relations Board election, and that that had been the advice of their attorney.

Q. And then what did you do?

A. Immediately took my cards and came to the

(Testimony of Robert R. McKinzie.)

National Labor Relations Board and filed for an election.

Q. Was that the same day on which you received the message? [55] A. That is correct.

Mr. O'Brien: Will you mark this for identification General Counsel's Exhibit 6.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

Mr. O'Brien: I have here an original petition which has been identified as General Counsel's Exhibit No. 6, indicating that it was filed——

Mr. Orloff: May I interrupt just one minute? I don't know whether you want this on the record or not. I just recalled that in the question of the preparation of that motion made by Mr. Gorman this morning I gave him a document out of my file. In looking at it now I see it has a different number. The chances are that his document has an improper number on it and should be corrected.

Trial Examiner Myers: I noticed that. It doesn't have to be corrected. I noticed it.

Mr. Orloff: I just didn't want any confusion on that, and I thought I would call that to your attention.

Trial Examiner Myers: You had the number of the representation case on the document instead of the complaint case.

Mr. Orloff: We had the number of the petition for an election.

Trial Examiner Myers: Yes.

(Testimony of Robert R. McKinzie.)

Mr. O'Brien: Mr. Examiner, through error I asked the [56] reporter to identify the consent election agreement instead of the petition. I now ask that that be marked for identification as General Counsel's Exhibit 6. General Counsel's Exhibit 6 is a copy of the Petition filed February 5, 1951, docketed as Case No. 21-RC-1790, and bearing the signature of R. R. McKinzie.

Q. (By Mr. O'Brien): Is that the petition to which you refer? A. Yes.

Q. And is it your testimony that this was filed the same day on which you received this telephone message? A. Yes, sir.

Trial Examiner Myers: What date is it?

Mr. O'Brien: February 5, 1951. I intend to identify the rest of the formal documents in the representation case at this time.

Trial Examiner Myers: Very well.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

Mr. O'Brien: Mark this as General Counsel's Exhibit 7.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 7 for identification.)

Mr. O'Brien: General Counsel's Exhibit No. 7 for identification is the consent election agreement approved February 13, 1951, in Case No. 21-RC-1790.

This is General Counsel's No. 8. [57]

(Testimony of Robert R. McKinzie.)

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 8 for identification.)

Mr. O'Brien: General Counsel's Exhibit 8 is the notice of election in that same case, the election to be held on Friday, February 23, 1951, with an eligibility pay roll date for the period ending February 14, 1951. Mark this.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

Mr. O'Brien: General Counsel's Exhibit No. 9 is the certification of conduct of election dated February 23, 1951.

Mark these.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 10, 11, 12, 13, 14, 15 and 16 for identification.)

Mr. O'Brien: General Counsel's Exhibit 10 is a tally of ballots, showing approximatey 62 votes were cast for Woodworkers Local 530, 26 votes cast against participating labor organization, 33 challenged ballots.

As General Counsel's Exhibit 11, objections to conduct affecting outcome of election, filed by R. R. McKinzie on February 28, 1951.

Trial Examiner Myers: When was the election held?

Mr. O'Brien: The election was held February 23, 1951.

As General Counsel's Exhibit 12, the Regional

(Testimony of Robert R. McKinzie.)
Director's report on objections setting aside the election and voiding [58] the results thereof.

General Counsel's Exhibit 12 bears the date May 24, 1951.

As General Counsel's Exhibit 13, an affidavit of service by registered mail showing that a copy of the report on objections was mailed to Rehrig-Pacific Company and to Woodworkers Local 530 on May 24, 1951; was received by Rehrig-Pacific Company on May 31, 1951.

Trial Examiner Myers: Was there any appeal taken from the Regional Director's determination of objections?

Mr. O'Brien: No, sir, no appeal was taken.

Trial Examiner Myers: Is that right, Mr. Orloff?

Mr. Orloff: Not to my knowledge. I was not in the matter at that time. The Regional Office records indicate that no appeal was taken.

Mr. O'Brien: As General Counsel's Exhibit 14, a withdrawal request dated June 20, 1951, approved June 20, 1951.

Trial Examiner Myers: Withdrawal of what?

Mr. O'Brien: This is a request to withdraw the petition in the above case without prejudice, Case No. 21-RC-1790. Those are all with reference to the representation case.

As General Counsel's Exhibit 15, a copy of a form notice advising Rehrig-Pacific Company that the petition in Case No. 21-RC-1790 had been with-

(Testimony of Robert R. McKinzie.)

drawn without prejudice. General Counsel's Exhibit 15 bears the date June 26, 1951.

As General Counsel's Exhibit 16, a four-page document [59] entitled "Eligibility Voting List for Election of February 23, 1951."

Trial Examiner Myers: Don't put this down.

(Discussion off the record.)

Trial Examiner Myers: Go ahead.

Mr. O'Brien: Mr. Examiner, as General Counsel's Exhibit 16, I call attention to the fourth page which——

Trial Examiner Myers: What is General Counsel's Exhibit 16?

Mr. O'Brien: It is the eligibility voting list for the election of February 23, 1951, and the blue or red pencil mark opposite each name indicates that the employee in question voted.

The fourth page shows the names of employees appearing on the February 14, 1951, list, but not eligible for the February 23rd voting, who had left before the date of the election, February 23rd, with Richard Gildart listed as factory supervisor, who is improperly included in the list. The other six who are named on the list had terminated sometime between the fourteenth of February and the twenty-third.

I offer General Counsel's Exhibits 6 through 16 in evidence.

Trial Examiner Myers: Gentlemen, after you have had an opportunity to examine the proposed exhibits, I will ask counsel to state for the record

(Testimony of Robert R. McKinzie.)

whether you have any objection [60] to the papers going in evidence. Would you like a few minutes to look those over?

Mr. Orloff: Well, I am looking them over, and I would like to check later those that I have listed as I went along.

Trial Examiner Myers: Very well. We will take a five-minute recess while we are doing that. Do you have the duplicates?

Mr. O'Brien: Yes, I have duplicates prepared of all the papers, I hope.

(Short recess.)

Trial Examiner Myers: Are you ready to proceed, gentlemen?

Mr. O'Brien: Ready.

Trial Examiner Myers: Will you take the witness stand, Mr. McKinzie, please?

Mr. Gorman: Mr. Examiner, upon reflection it occurred to me that perhaps I had not taken the proper steps to adequately protect my clients. If I may at this time, I would like to make a statement and also one or two motions.

Trial Examiner Myers: Very well, sir, Proceed.

Mr. Gorman: First, I think it is proper that I should have excepted, to protect our rights, to the denial of the motion for intervention.

Trial Examiner Myers: Well, you have an automatic exception. [61]

Mr. Gorman: I was not sure of that. That is the reason I am doing it at this time.

(Testimony of Robert R. McKinzie.)

Trial Examiner Myers: Very well. The exception is noted.

Mr. Gorman: At this time, then, I would like to object under 102.41 to the continuation of this hearing, on the ground that——

Trial Examiner Myers: 102 point what?

Mr. Gorman: 102.41, on the ground that a determination of this matter may seriously affect the rights of my client, and that if it should be determined favorably to the charging party it would necessitate the employer recognizing the charging party as the bargaining agent, and that we have alleged in our petition that we have been recognized as the bargaining agent, and the determination of that would seriously interfere with our rights.

Trial Examiner Myers: The objection is noted and it is overruled, to which ruling you have an exception.

Mr. Gorman: Thank you, your Honor.

Further, then, the motion is to stay the proceedings for the purpose of allowing us to appeal the ruling.

Trial Examiner Myers: You may appeal to the board, but I will not adjourn the hearing for the purpose of an appeal.

Mr. Gorman: May I state again without elongating this argument, that it is on the same grounds as I previously stated on the other motion, because our rights will be seriously [62] affected as the bargaining representative of the employees. That is the reason I ask for the stay. And that, I understand,

(Testimony of Robert R. McKinzie.)

is overruled and I have an automatic exception to that?

Trial Examiner Myers: Yes.

Mr. Gorman: Thank you very much.

Trial Examiner Myers: If you wish, you may file a brief, if the other parties file a brief; whether they do or not, at the conclusion of the hearing you may file a brief with me.

Mr. Gorman: Thank you very much.

Trial Examiner Myers: You may proceed, Mr. O'Brien.

Mr. O'Brien: I am offering General Counsel's Exhibits 6 to 16 in evidence.

Trial Examiner Myers: Are there any objections?

Mr. Orloff: No objections.

Mr. Garrett: No objections.

Trial Examiner Myers: There being no objections, the papers are received in evidence, and I will ask the reporter to kindly mark them General Counsel's Exhibits Nos. 6 through and including 16.

(The documents heretofore marked General Counsel's Exhibits Nos. 6 through 16 for identification were received in evidence.)

[Printer's Note: Exhibits 6 to 12, inclusive, and Exhibit 15 are set out at pages 13-32.]

Q. (By Mr. O'Brien): I show you General Counsel's Exhibit 11, entitled "Objections to Conduct Affecting the Outcome of the Election," the

(Testimony of Robert R. McKinzie.)

original of which was signed by you. When did the matters described in General Counsel's Exhibit 11 first [63] come to your attention?

A. Immediately after the election. I was in San Francisco the day the election was held, and I returned, and as soon as I returned the matter was referred to me and I filed this petition and signed it.

Trial Examiner Myers: When did you return from San Francisco, that day or the next day?

The Witness: In about—I think the election, if I fix the thing right in my mind, was held on Thursday or Friday, and I returned from San Francisco Sunday night.

Mr. O'Brien: I have no further questions.

Trial Examiner Myers: Mr. Garrett, have you any questions to ask this witness?

Mr. Garrett: No questions.

Trial Examiner Myers: Mr. Orloff, have you any cross examination?

Mr. Orloff: Yes.

Trial Examiner Myers: Proceed.

Cross Examination

Q. (By Mr. Orloff): When did you leave the city on this trip that you say you were out of the city at the time of the election?

A. The dates I don't have fixed now for the moment, but I was at San Francisco to the Lumber and Sawmill Workers convention, and that was held during the week that the election was [64] on.

(Testimony of Robert R. McKinzie.)

Q. You don't recall. How long were you in San Francisco.

A. I think I left here Tuesday night and returned Sunday night.

Q. And it was on Sunday or Monday following that you heard about the matters that you have set forth in that petition or your objections.

A. That is correct.

Q. You had never had any information concerning it at any time prior thereto?

A. Well, I knew there were things going on there that were irregular.

Q. Well, which are the things that are alleged in Exhibit 11 that were known to you before you went to San Francisco?

A. I don't think there is anything in here that I knew too much about before I went to San Francisco.

Q. Well, what were the things that you knew about that you just said were irregularities? What did you have reference to when you said there were irregularities?

A. I am afraid if I told you that you would object to what I say.

Trial Examiner Myers: Well, just try him out then. Go ahead.

The Witness: Harassing of employees, threatening them, and if they joined the union that the plant would close down, [65] and that if they voted for the union that the plant would work three days a week.

(Testimony of Robert R. McKinzie.)

Q. (By Mr. Orloff): Those were the things that you knew before you filed the petition, is that right? That is, before you filed your objection, after you got back from San Francisco.

A. That was the—I would say yes, it was.

Q. What were the things that you knew? You say you knew certain things. What were the things that you knew? A. I only knew hearsay.

Q. In other words, then, you say that the only things that you knew about these irregularities were what somebody else said to you?

A. That is correct.

Q. And those things that you just said were the irregularities you had reference to were harassing the employees and threatening the employees of a shutdown or of a limit of three days' work, and that sort of thing, is that correct?

A. That is correct.

Q. And you knew that before you went to San Francisco? A. I think I did.

Q. Did you make any objection to the holding of the election upon that ground prior to the time of the election?

A. No.

Q. Having that knowledge, you still made no efforts to prevent the holding of the election? [66]

A. I didn't think that the employer would have the audacity to make a speech 30 minutes before the election, go quite to that extent, and that is the reason why I made no objection.

Q. Am I to understand, then, that it is your tes-

(Testimony of Robert R. McKinzie.)

timony that the employer made a speech 30 minutes before the election?

Trial Examiner Myers: Are you going beyond or behind the determination of the regional director?

Mr. Orloff: I am merely trying to examine him on a matter which he has already been examined on on direct examination.

Trial Examiner Myers: I mean, do you intend to go beyond the regional director's determination?

Mr. Orloff: Well, if the purpose of the direct examination was to go behind it, I assume that the cross examination must of necessity be doing the same thing.

Trial Examiner Myers: I merely want to know what you are doing.

Mr. Orloff: I am testing the witness' credibility.

Trial Examiner Myers: All right. I just want to know what you are doing. Go ahead.

Mr. Orloff: Will you read the last question, Mr. Reporter?

(Question read.)

Q. (By Mr. Orloff): Will you answer that?

A. It certainly was in the afternoon of the day of the election. [67]

Q. Now, you made a statement, Mr. McKinzie, that it was 30 minutes before the election. Now, you were not in the city on the day of the election, were you, Mr. McKinzie? A. No, sir.

Q. Did someone tell you that he made a speech 30 minutes before the election?

(Testimony of Robert R. McKinzie.)

A. He made a speech the day of the election.

Trial Examiner Myers: Did anybody tell you that?

The Witness: Yes, I was informed that he made a speech to the employees the day of the election.

Q. (By Mr. Orloff): And who told you that?

A. Employees of the factory.

Q. Can you name anyone?

A. I think there will be other witnesses put on this stand——

Trial Examiner Myers: Well, can you remember anyone by name who told you that?

Mr. Garrett: Will you just answer that question yes or no. I think it calls for a yes or no answer.

Trial Examiner Myers: That is right.

The Witness: I will answer it "No."

Q. (By Mr. Orloff): You don't know anyone who told you that.

Trial Examiner Myers: He said by name. He doesn't remember the name.

Q. (By Mr. Orloff): Well, can you describe anyone who told you that, then? Was it any one of the gentlemen seated in [68] this room?

A. Yes.

Q. Which one of the gentlemen in the room was it? A. I would answer that question "No."

Trial Examiner Myers: Didn't you hear his question? He asked you was it one of the persons in this hearing room who told you that. You said "Yes." He asked you which one. Did anybody sitting in this hearing room tell you that Mr. Rehrig

(Testimony of Robert R. McKinzie.)

made a speech on the day of the election? Did you hear the question?

The Witness: I am trying to collect my thoughts. I am trying to collect my thoughts.

Trial Examiner Myers: Look at the four or five people in the back of the hearing room.

The Witness: I am not positive whether it was the——

Trial Examiner Myers: The question is, did anybody in the back of the room tell you that? That is the only question now.

The Witness: I don't want to be too sure.

Trial Examiner Myers: Go ahead, Mr. Orloff.

Q. (By Mr. Orloff): Now, Mr. McKinzie, you first appeared at the Rehrig-Pacific Company about lunch time on or about January 28th or 29th, 1951, is that correct?

A. Approximately, yes.

Q. And on that occasion you talked to Eddie Baca and Frank [69] Marquez, among others.

A. That is right.

Q. You next returned on the 31st of January, the following Monday, in any event, is that right?

A. I was there on the following Monday, on the 31st of January.

Q. Was that the next time that you returned to the plant?

Trial Examiner Myers: Well, the 31st of January was not a Monday. Now, what date were you there, on the 31st or on the following Monday?

The Witness: I was there on Monday, I am sure.

(Testimony of Robert R. McKinzie.)

I have in my notebook that I was there, in my office I have in my notebook that I was.

Trial Examiner Myers: Were you there on the day you wrote the letter of January 31st?

The Witness: That is right.

Trial Examiner Myers: That is the first day that you spoke to Mr. Rehrig?

The Witness: Yes, that was the first day I spoke to Mr. Rehrig.

Trial Examiner Myers: All right. Whether it was Monday or some other day, that is the day you spoke to him, is that right?

The Witness: Well, if that was not Monday, then I was there—I was there on Monday as well as the day that I [70] wrote the letter. It was my impression that the 31st was Monday.

Q. (By Mr. Orloff): All right, then. If the 31st is not Monday, and I think it is pretty well established that it is not or was not, the second time that you had any conversation at the plant was on the 31st, is that correct?

A. The second time I talked to Mr. Rehrig.

Q. The second time you talked to Mr. Rehrig was on the 31st.

A. The first time I talked to Mr. Rehrig was on the 31st.

Q. Now, you said that there was some two or three days prior to the 31st—in other words, you were at the plant sometime around the 28th or 29th, so you testified. A. Yes.

Q. And then you testified that the following

(Testimony of Robert R. McKinzie.)

Monday was the next time that you went back. Now, with that in mind, would you say that the 31st was the day that you went back that you have reference to, and that some two or three days prior thereto was the first time you had been there?

A. No, I wouldn't say that. The 31st is the first time that I talked to Mr. Rehrig.

Q. How many times were you to the plant to see the employees before you talked to Mr. Rehrig?

A. I wouldn't want to say two or three or four, because in organizing you go every day. When you start out on a plant you go every day. [71]

Q. Now, Mr. McKinzie, let me ask you this: Did you not on direct examination testify that the first time you were there was about the 28th or 29th and that the next time you went back was a few days later?

A. Saturday and Sunday might have come in between there.

Q. Irrespective of what days came in between, Mr. McKinzie, was it a few days between your first vist and your second visit?

A. It was with Mr. Rehrig.

Trial Examiner Myers: Oh, listen. When did you first go up there to see anybody, employees or anybody else?

The Witness: Those dates are fixed——

Trial Examiner Myers: About how long before you saw Mr. Rehrig the first time.

The Witness: Oh, maybe four or five days.

(Testimony of Robert R. McKinzie.)

Trial Examiner Myers: All right. That is four or five days before January 31st?

The Witness: That is correct.

Trial Examiner Myers: Did you see any of the employees at the plant again before you first saw Mr. Rehrig?

The Witness: Oh, yes.

Trial Examiner Myers: When was the second time you were there?

The Witness: To the company? I don't have——

Trial Examiner Myers: The employees. [72]

The Witness: I don't have the dates fixed.

Trial Examiner Myers: About how long after?

The Witness: After the first time we saw the employees?

Trial Examiner Myers: Yes.

The Witness: The second time we saw the employees I got this list of names.

Trial Examiner Myers: About how long after the first time?

The Witness: The whole incident happened in four or five days from my first appointment with the employees until we talked to Mr. Rehrig. It was one of those things that happened quickly.

Trial Examiner Myers: Go ahead.

Q. (By Mr. Orloff): Now, you said you got a list which is Exhibit 4 here. Is this the list you referred to when you say you got a list?

A. That is right.

Q. You say you got this list on your second appearance at the plant? A. Yes.

(Testimony of Robert R. McKinzie.)

Q. Was that on the same day that you also talked to Mr. Rehrig?

A. I think this was the day before.

Q. This was the day before? A. Yes.

Q. And how long after this list, Exhibit 4, was it before you received the cards from Mr. Baca?

A. The cards were given out on two or three different occasions.

Trial Examiner Myers: Listen to the question. How soon did you get the cards that were marked as General Counsel's Exhibit 4 for identification?

The Witness: After we got that list?

Trial Examiner Myers: Yes. Did you get them before the list? Did you get all the cards at once or did you get them piecemeal?

The Witness: No, they were gathered in piecemeal. The majority of them was gathered up by Baca on given days. The rest of them were gathered up piecemeal.

Q. (By Mr. Orloff): You saw Baca at the plant and he gave you the list, Exhibit 4, is that right?

A. That is right.

Q. At that time you gave him some cards, is that right?

A. Cards were given out before that by two organizers. One of them is here and the other one is not. Cards were given out on three different occasions.

Q. Do I understand your testimony now that before you received the list, Exhibit 4, that cards had already been given out?

(Testimony of Robert R. McKinzie.)

A. A few, that is right.

Q. Did you testify on direct examination that when Mr. Baca gave you this list, Exhibit 4, that you then gave him some cards? [74]

A. I did.

Q. Did you give him the cards at that time?

A. I gave him some cards at that time and cards were given out before that.

Q. Cards had been given out prior to that?

A. That is right. There happened to be four men, four organizers working on that shop, myself, Cordil, Starkey and Rife.

Trial Examiner Myers: Will you spell that last name?

The Witness: Rife, R-i-f-e. He isn't here. Rife made the first contact on that job.

Q. (By Mr. Orloff): Then after this list was presented to you you received some cards from Baca and you picked some up yourself, I believe you testified, is that correct?

A. That is correct.

Q. About how many did you pick up yourself?

A. I couldn't give you any idea. I haven't any count on them. I didn't keep any record of it.

Q. Was it more or less than 10?

A. I didn't keep any record of it. I couldn't say.

Q. You wouldn't know whether it was more than 10 or less than 10? A. No.

Q. About how many did you receive from Baca, approximately?

A. No, I couldn't exactly tell you that. [75]

(Testimony of Robert R. McKinzie.)

Q. Do you know whether that was more or less than 10? A. I know it was more than 10.

Q. Was it more or less than 20?

A. Might have been.

Q. I know it might have been more or less, Mr. McKinzie. I would like to know whether you know it was more than 20 or less than 20.

A. I told you I didn't know whether I got less than 10 or more than 10, and I didn't know about how many Baca gave us because they were not counted.

Q. And you can't estimate the number?

A. No.

Q. Now, after you got the list you advised Mr. Rehrig that you represented the majority and wanted to enter into a union agreement, is that correct? A. That is right.

Q. Then this conversation was had, you had a conversation on two occasions after the 31st.

A. I didn't say two occasions after the 31st. I said one on the 31st and one after that.

Q. Just one after that, one after the 31st?

A. I think it was one.

Q. How long after the first conversation that you had with Mr. Rehrig did you have the second one?

A. I have no dates fixed on that. [76]

Q. Well, the approximate number of days.

A. I wouldn't want to say, because——

Trial Examiner Myers: Well, was it two years after?

(Testimony of Robert R. McKinzie.)

The Witness: No, the election was held before that.

Trial Examiner Myers: All right, then bear those dates in mind, will you? Let's get on with this hearing.

The Witness: Well, his purpose is to try to confuse me with them dates.

Trial Examiner Myers: Nobody is trying to confuse you at all. You said four or five dates on your direct examination. When did you go in to see Rehrig again, about how long after?

The Witness: Well, it was a few days after the first meeting we had with him.

Q. (By Mr. Orloff): Then you filed a petition, Exhibit 6, how long after the second conversation that you had with Mr. Rehrig or the third one, or whichever one it was?

Trial Examiner Myers: He filed it on the 5th.

Mr. Orloff: Yes, your Honor.

Q. (By Mr. Orloff): About how long after the conversation that you had with Mr. Rehrig was it before you filed the petition?

A. Well, evidently the whole thing happened with the course of five or six days, because on the 5th I filed the petition, and evidently prior to the date of the petition he called and informed my secretary that he wanted a National Labor Relations [77] Board election and we filed the petition. I think the dates fixes that.

Mr. Orloff: No further questions.

Trial Examiner Myers: No redirect?

(Testimony of Robert R. McKinzie.)

Mr. O'Brien: I have no redirect.

Trial Examiner Myers: Mr. Garrett?

Mr. Garrett: No questions.

Trial Examiner Myers: You are excused, Mr. McKinzie. Thank you very much.

(Witness excused.)

Mr. O'Brien: Mr. Baca.

EDWARD BACA

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Edward Baca.

Trial Examiner Myers: Where do you live?

The Witness: 335 Laurel Street.

Trial Examiner Myers: Los Angeles?

The Witness: Wilmington, California.

Trial Examiner Myers: Mr. O'Brien, you may proceed with the examination of Mr. Baca, who has been duly sworn. You may proceed.

Q. (By Mr. O'Brien): During the month of January, 1951, were [78] you employed at Rehrig-Pacific Company? A. Yes, I was.

Q. What was your first contact with any representative of the charging union?

A. My first contact?

Q. Yes, sir. A. It was with Mr. Rife.

(Testimony of Edward Baca.)

Q. Where was that?

A. Outside the plant.

Q. Do you recall approximately when, sir?

A. Oh, it was on a Thursday, about the 24th or 25th.

Trial Examiner Myers: Of what?

The Witness: Of January or—yes, January.

Trial Examiner Myers: This year?

The Witness: Yes, sir.

Q. (By Mr. O'Brien): After you spoke to Mr. Rife, did you speak to your fellow employees?

A. Yes, I did.

Q. Where?

A. Inside the plant.

Q. And did you have any meeting with your fellow employees outside the plant?

A. Yes, that afternoon.

Q. Approximately when, sir?

A. Oh, you mean the date? [79]

Q. Yes, if you recall.

A. The same date I gave you right now, the 24th or 25th. I don't remember what day it was. On Thursday after work.

Q. By the way, do you speak Spanish?

A. Yes, I do.

Q. Are there some or were there some employees who speak little or no English?

A. That is right.

Q. Where did this meeting outside the plant take place?

A. Well, I think that company is on 26th

(Testimony of Edward Baca.)

Street, which is a dead-end street, and we went down to the end of it.

Q. Were any persons there other than employees of Rehrig-Pacific Company? A. No.

Q. Did you say anything to the employees about the union?

A. Yes, I did.

Q. What did you say?

Mr. Orloff: Objected to, if the Court please, as calling for hearsay.

Trial Examiner Myers: Sustain the objection.

Mr. O'Brien: Mr. Examiner, I am laying the foundation for the receipt of a document in evidence, and this is necessary.

Q. (By Mr. O'Brien): I show you General Counsel's Exhibit 4 for identification. Does that bear the signatures of employees [80] of Rehrig-Pacific Company? A. Yes, it does.

Q. And were those signatures made in your presence? A. Yes, sir.

Q. Where?

A. Down at the meeting place where I told you, down the road.

Q. Which you just described.

A. Yes.

Q. I notice that you signed the top one there.

A. Yes, I did.

Q. And what did you say to the employees to induce them to sign this?

Mr. Orloff: Objected to, if the Court please.

Trial Examiner Myers: You mean by reason of

(Testimony of Edward Baca.)

what he said these people signed it? Is that what you mean?

Mr. O'Brien: That is what I mean. I am trying to explain what they signed.

Mr. Orloff: If the Court please, I make the objection, first, that it is hearsay, and further objection that the document is the——

Trial Examiner Myers: I will sustain the objection. You made some remarks to those people at this meeting.

The Witness: Did I make some remarks?

Trial Examiner Myers: Yes. You said something there, did [81] you?

The Witness: I told them about the union.

Trial Examiner Myers: All right. And after you made those remarks the employees signed that paper; did you see those employees sign that paper?

The Witness: Yes, I seen the employees sign that paper, yes.

Trial Examiner Myers: All right, go ahead.

Q. (By Mr. O'Brien): Did you tell the employees why you wanted them to sign?

A. Yes, I did.

Q. What did you tell them?

Mr. Orloff: Objected to as hearsay.

Trial Examiner Myers: What is that? They signed it. What else do you want?

Mr. O'Brien: It carries no caption. So far it is only a list of signatures. I want to find out what the employees thought they were signing.

(Testimony of Edward Baca.)

Trial Examiner Myers: I will sustain the objection.

Q. (By Mr. O'Brien): Was Mr. Delgard present? A. Who?

Q. Delgard, the foreman.

A. Gildart? No, he was not.

Q. He was not? A. No. [82]

Q. Were any supervisory employees present?

A. No, no supervisors, no foremen were there.

Q. What did you intend by signing your name?

Mr. Orloff: Objected to, if the Court please; what he intended by signing his name.

Q. (By Mr. O'Brien): Why did you sign your name?

Mr. Orloff: Calling for a conclusion of the witness.

Q. (By Mr. O'Brien): Why did you sign your name?

A. Well, I was more or less representing the union. I mean, I was talking to the men about the union. Being that I was going to be talking to them, being that I was talking about it, I signed my name first, and the rest of the men followed right behind me and signed their names.

Q. By signing your name, what did you indicate?

Mr. Orloff: Objected to, if the Court please. The written document is the best evidence.

Mr. O'Brien: Mr. Examiner, it is always possible to explain by parol an ambiguous written document.

(Testimony of Edward Baca.)

Trial Examiner Myers: There is nothing ambiguous on it, because there is nothing written on it except a lot of names.

Mr. O'Brien: A lot of names written on it, and people don't sign a lot of names to something without some reason, and there is no ground at all for excluding that testimony.

Trial Examiner Myers: You asked him why he signed it and he testified. [83]

Q. (By Mr. O'Brien): Did you ask the other employees to sign it?

A. I asked them if they wanted to sign it. It was up to them.

Q. After this document was signed, what did you do with it?

A. Well, it wasn't all signed in one day.

Q. I see. All right.

A. Some of them were signed at this meeting, at this meeting.

Q. Did you do anything with that same list the following day? A. No, I didn't.

Q. When were the other signatures put on?

A. Well, they were put on—some of them were working the night shift, and there was no way of me getting hold of them, because I left right away in order to get my ride.

Q. Yes.

A. So I just took them whenever I could get them; next day there was some other ones inside the plant during the day shift that I hadn't gotten yet, so I got them that Monday.

(Testimony of Edward Baca.)

Q. You got them the following Monday?

A. Yes, sir.

Q. And every signature on there was obtained in your presence? A. Yes.

Q. What did you do with them on the following Monday?

A. I turned them in to Mr. McKinzie.

Q. Where?

A. Outside the plant. [84]

Trial Examiner Myers: That date, that Monday?

The Witness: That Monday.

Q. (By Mr. O'Brien): What did you tell Mr. McKinzie?

Mr. Orloff: Objected to as calling for hearsay.

Trial Examiner Myers: Yes.

Mr. O'Brien: Was there a ruling? I didn't hear it.

Trial Examiner Myers: I sustained the objection. I am sorry. I thought you had heard it.

Mr. O'Brien: Mr. Examiner, it is absolutely impossible to separate the words and the actions in a sequence like this. It is all part of the res gestae. It is all part of what took place. With all due respect to the Examiner, I——

Trial Examiner Myers: Well, you may make an offer of proof. [85]

Mr. O'Brien: An offer of proof is no help at all, Mr. Examiner.

Q. (By Mr. O'Brien): After you turned this list over to Mr. McKinzie, what did you do?

(Testimony of Edward Baca.)

A. After I turned the list over to him I didn't do nothing. He gave me the cards then.

Q. He gave you some blank cards, is that right?

A. Yes, sir, application cards.

Mr. O'Brien: I offer General Counsel's Exhibit 4 in evidence.

Trial Examiner Myers: Any objection?

Mr. Orloff: No objection.

Trial Examiner Myers: There being no objection, the paper is received in evidence and I will ask the reporter to please mark it as General Counsel's Exhibit No. 4.

(The document heretofore marked General Counsel's Exhibit No. 4 for identification was received in evidence.)

[See page 11.]

Q. (By Mr. O'Brien): What did you do with the blank cards that you received from Mr. McKinzie?

A. Well, some had already been distributed, so I took the ones that I had, that he had given me, and distributed them amongst the rest of them that hadn't had any yet.

Q. Were any of those cards returned to you?

A. Yes.

Q. And with regard to the cards that were returned to you, [86] what did you do with them?

A. I put them in my pocket.

Trial Examiner Myers: Well, what eventually did you do with them?

(Testimony of Edward Baca.)

Q. (By Mr. O'Brien): Then what did you do with them?

A. We collected them until I thought I had about all of them, and then I turned them over to Mr. McKinzie. He found some turned in I didn't get, that hadn't given them to me.

Q. By looking at these cards would you be able to indicate which ones were signed in your presence?

A. Approximately; not to the exact point.

Q. Do you have some specific recollection of some of these cards being signed in your presence?

A. I can remember some of them, yes.

Trial Examiner Myers: Well, Mr. Orloff, do you dispute the authenticity of any of the signatures on those cards?

Mr. Orloff: I don't know a thing about it, one way or the other.

Trial Examiner Myers: Have you any way of checking those signatures with the——

Mr. Orloff: I haven't seen the cards until today. I don't have anything here with me.

Trial Examiner Myers: No, I don't mean here. I mean at the plant.

Mr. Orloff: We have their pay checks at the plant. [87]

Mr. O'Brien: Well, I will be glad to leave those with Mr. Orloff, and he can examine them this evening or have someone out at the plant examine them this evening. That will obviate the necessity of going through all those in detail.

(Testimony of Edward Baca.)

I will pass that for the moment. I will hand General Counsel's Exhibit 5 for identification to Mr. Orloff, and he will attempt to have a comparison of the signatures made before we reconvene tomorrow morning.

Q. (By Mr. O'Brien): Now, Mr. Baca, are you acquainted with Mr. Delgart—I beg your pardon, Gildart.

A. You mean——

Trial Examiner Myers: Do you know a man by the name of Gildart?

The Witness: Yes, I do, Richard Gildart.

Trial Examiner Myers: What is his job at the company, or what was it?

The Witness: Well, I take it as superintendent.

Q. (By Mr. O'Brien): Did you have a conversation with Mr. Gildart with reference to the union? A. Yes, I did.

Q. The first conversation was when, sir?

A. Oh, let's see——

Q. With reference to these lists and cards.

A. I turned these cards in on a Monday. Oh, about Tuesday. I am not sure, but I think it was on a Wednesday. [88]

Trial Examiner Myers: The following Wednesday?

The Witness: Yes, sir.

Trial Examiner Myers: Do you want a calendar? Perhaps you can fix that date.

The Witness: Yes. It was on a—around the 30th or 31st.

(Testimony of Edward Baca.)

Q. (By Mr. O'Brien): You said the 30th or the 31st?

A. Yes, around there, the 30th or 31st.

Q. Where did this conversation take place?

A. In his office.

Q. And about what time of day?

A. Oh, it was early in the morning, about 8:30, 8:00 o'clock, something like that.

Q. Who was present?

A. Richard and I and the leadman on the floor that was boss, Edward Hinojosa.

Q. Can you spell that?

A. Edward, known as Lotto.

Q. What was the conversation?

A. Well, it is—it wasn't—to start out with, it was about the union, asked me what I thought I would gain by trying to bring the union in. I told him more money.

Trial Examiner Myers: There are four people there now. We don't know who you mean by "he."

The Witness: There was three people. [89]

Trial Examiner Myers: Who is "he"?

The Witness: Well, Richard Gildart.

Trial Examiner Myers: All right, go ahead. In the first place, how did you get to his office? Did you go there yourself or were you called or what?

The Witness: No, I was called by Edward Hinojosa, that Richard wanted to see me.

Trial Examiner Myers: Did he go with you to Mr. Gildart's office?

The Witness: No, he didn't. He just hollered

(Testimony of Edward Baca.)

at me—whistled, not hollered—told me, "Richard wants you," so I followed him. He went ahead, and went in the office, and I followed him in there. Richard talked to me and asked me what did I have to gain by doing this.

Trial Examiner Myers: Doing what? Tell us what he said.

The Witness: Bringing the union in there. He didn't think of all people—He had heard about it, but he says, "Of all people"—I don't know how to put it, but of all people to bring up the union, he didn't think it was me, so I told him, "Why not?" I says, "A man wants more money." I says, "He is entitled to see if he can get more."

So he told me, he says, well, he says—I don't know if this has anything to do with the case. I don't think it does.

Trial Examiner Myers: Just tell us what he said about the union. [90]

The Witness: He says, "Somehow I don't think you are even trying to get the union in, it is just the wives themselves who have come into the family," because being that his cousin is married to my cousin, he thought I was trying to bring it through the family.

I told him then, I says, "What happens in your family and my family," I says, "is my business, what happens in my family is my business and what happens in your family is your business." I didn't try to bring the union in here. I says, "I got more or less speaking with the men and they—

(Testimony of Edward Baca.)

I didn't want to do anything against your family, it wouldn't be this way," I says, "I wouldn't think the union would do nothing to hurt us."

So he started trying to talk to me about how the company would be if the union did come in.

Q. (By Mr. O'Brien): Yes, but what did he say, sir?

A. Well, he says, being—he says, "If you are bringing the union," he says, "how do you know the company can stand something like this?"

Well, I says, "I don't know."

He says, "Why didn't you come down and find out from me before you did it?" And I says, "To tell you the truth, I didn't bring it down to you because it interfered with you asking whether the company could take it or not. I just thought being the men want more money and they want the union, [91] that now we have the chance we might still get the union in."

So then he says, well, he says, "You know," he says, "if the union does come in," he says, "the company won't be able to operate every day."

He says, "Half the men around here will have to work three days, and maybe the only ones working the whole week will be the guys on the saws."

Mr. Orloff: On the what?

The Witness: On the saws, "in order to get ahead enough work so we can do it in those three days, because the men are faster than the saws are."

(Testimony of Edward Baca.)

So then after that, I don't think he said very much after that, and then I went back to work.

Q. (By Mr. O'Brien): Did you have any other conversation with Mr. Gildart when the union was mentioned?

A. I had one more conversation with him, and that is one day, I don't know—Can't now remember that date, what day it was, or anything, because he called us into the office.

Trial Examiner Myers: Who is "he"?

The Witness: I was just going to explain.

Q. (By Mr. O'Brien): Was it after you got signatures on those cards?

A. Yes, it was after.

Q. Was it before or after the election?

A. Well, it was right after the signature of the cards. He [92] said something about—he came out with this deal about the bonus, and then——

Q. Try to fix the date of your conversation with Mr. Gildart.

A. He asked me—he asked me if it was before the election. Yes, it was before the election. I think it was about, oh, about three or four days later, but I am not sure.

Trial Examiner Myers: You mean after your first talk?

The Witness: Yes, sir.

Q. (By Mr. O'Brien): Who was present?

A. I don't know his first name. Coffey, one of the colored boys that is working there.

Q. And where did it take place?

(Testimony of Edward Baca.)

A. In back of the machine room. There was a new addition that they added onto the machine room, and we were inside there.

Q. What was the conversation?

A. Well, to form a company union.

Q. What was said at that time?

A. Well, Richard had said about forming this, Richard Gildart had said about forming this company union. He says the men could pick out their own committeemen, somebody to represent them. Yes, he says, "You guys could," he says, "You can come to me or you can go up into the office and talk to Lou Kiser," he says, "or if you go further than that you can go to Mr. Rehrig and talk to him."

* * * * * [93]

Oh, he said, "You could go to Mr. Rehrig and talk it over with him, and see if we can't talk him into an agreement with the company. If Mr. Kiser don't want to and refuses you," he says, "then you can get your union, but first try something, and if you are denied, then," he says, "you can get the union in."

And so I told him, I says, well, I says, "It is up to the boys then because if they choose they want the union," I says, "and they now so many of them changing their minds," I says, "it don't do no good for me to keep on fighting with [94] the men."

And he says, well, he says, "A lot of them even say they were forced into it."

(Testimony of Edward Baca.)

I says, "I don't know who pushed them into it then," so he says, "That one guy there said that he just signed there because the rest of the guys signed."

I told him, I says, "Well, if any man signs anything like that, he shouldn't be working here because he didn't know what he is signing for."

He says, "It was explained to him at first, and everything was explained to him and he understood signing this stuff like that."

Well, he says, "So much for that." And then he says, "This union, this committee that you guys formed," he says, "if the guys took the right guys and talked to the men while you pick out the ones that you want," he says, "you come back and tell me when you are ready and we will beat you into the office."

I don't remember what Coffey said, but—I made a mistake there. There was a fourth man in there, and that was Howard, the machinist man there. I don't know his last name, but he kept butting in on the conversations there.

Q. (By Mr. O'Brien): Would that be Howard Telke?

A. I don't remember that last name. He is a machinist. No. He was a foreman on the night shift. [95]

Trial Examiner Myers: Well, go ahead and tell us what else was said.

Mr. Orloff: I may say this for the record, that I am now looking at the same list that Mr. O'Brien

(Testimony of Edward Baca.)

is looking at. There only seems to be a few men listed who could possibly be the machinist, maintenance, I guess it is.

Trial Examiner Myers: He said he was foreman of the night shift.

Mr. Orloff: Only one of them is Howard, so I guess Telke would be the one.

The Witness: Well then, that is the one.

Trial Examiner Myers: Was he foreman on the night shift?

Mr. Kiser: No.

Q. (By Mr. O'Brien): He was a machinist, not a foreman.

A. He was not foreman, but he was in the department and told the men what to do. He repeated the orders from Richard.

Trial Examiner Myers: All right. Go ahead. Do you remember anything else that was said?

The Witness: No, that was about all that I remember right now.

Trial Examiner Myers: Come on, Mr. O'Brien.

Q. (By Mr. O'Brien): During the same period did you see Mr. Gildart going through the shop with a book? A. Yes, I did.

Q. Did you have any conversation with him on that occasion? [96]

A. Very little, just a little. He came around as I was stacking the wood that was coming off the machine, cutting machine there, and I seen him talking to the other boys. Then after we got home, he asked me, he says, he didn't ask me, he told me,

(Testimony of Edward Baca.)

he says, "What are you for the union so strong for?"

So I says, "That is right, I am for the union," and he marked here down.

Q. Did you say he made a mark opposite your name?

A. No.

Q. You didn't?

Trial Examiner Myers: You said he marked something down—union.

The Witness: Well, he checked my name, had a mark right here before the name.

Q. (By Mr. O'Brien): He had a list of names?

A. Well, he had a little black book and he put down the names. He had a bunch of names there. I didn't see all of them.

Q. Do you recall any speech made by Mr. Rehrig to the group of employees?

A. Yes, I remember one speech.

Q. And that was when, approximately? When was it? After the cards were signed?

A. Yes.

Q. How long after? [97]

A. Oh, it was, I think it was—well, there was one speech before Mr. Rehrig.

Trial Examiner Myers: You were asked about Rehrig now.

The Witness: I was trying to think, and by mentioning this other speech I could.

Trial Examiner Myers: Just try to think to yourself.

(Testimony of Edward Baca.)

The Witness: It must have been about five or six days after.

Q. (By Mr. O'Brien): What time of the day?

A. Well, it was——

Trial Examiner Myers: How long before the election? Was it before or after the election?

The Witness: It was before the election.

Trial Examiner Myers: How long before the election. The election was on the 23rd of February. You don't remember that? Sometime in February?

The Witness: Might have been about the first part of February.

Trial Examiner Myers: Go ahead. What is the question, Mr. Reporter?

(Question read.)

Q. (By Mr. O'Brien): What time of day?

Trial Examiner Myers: Morning, noon or night?

The Witness: About noon.

Trial Examiner Myers: During working hours?

The Witness: Yes.

Q. (By Mr. O'Brien): Were the employees gathered together? A. Yes, they were.

Q. How did you get your instructions together?

A. Well, Richard went around and stopped all the machinery. It must have been about 11:30, 11:30 or 25 minutes to 12:00.

Q. What did Mr. Rehrig say?

A. Well, he says that he heard that we are trying to get the union in through his superintendent, Richard Gildart, and that, he says, he don't think that we are going to get on like that, as a matter

(Testimony of Edward Baca.)

of fact it is up to the boys to think what you want, that is up to you folks, but he says, however, "Richard and I have been planning on something that we thought we could do about that additional seven per cent, and since you folks have come out for this union we thought maybe we would bring it up to you now," and that was that bonus percentage, something like that, and, oh, I don't remember quite everything what he said there.

Q. Did anyone else speak at the same time?

Trial Examiner Myers: You mean at the same meeting?

Q. (By Mr. O'Brien): The same meeting.

A. To the men?

Q. Yes. A. No.

Q. Do you recall the day Mr. Rehrig made a speech, the day [99] before the election, too?

A. It was, yes, it was the day before the election.

Q. About what time?

A. Oh, around——

Trial Examiner Myers: What difference does it make what time it was.

Q. (By Mr. O'Brien): What time of day?

A. I don't remember what time of day it was. It was either in the afternoon or the morning, because I thought it was three different times he stopped us there.

Q. You have told us about one occasion. When was the next occasion when he stopped you?

A. Well, no, that was two days, that is right,

(Testimony of Edward Baca.)

two times that he spoke to us. Once was Mr. Kiser talked to us, then Mr. Rehrig, and then he talked to us one day before the election, something like that.

Q. All right, what did he say when he talked one day before the election?

A. He told us that, he says, he—he says, "that was something that you men just don't go in and sign later, you know—I mean that is something that you could go in and sign," so he says, "it is either up to us to have the plant or have their union, it is up to the boys, if that is what you want," but he says, "Then I would like to have you give thought and well consider all this percentage basis." He says, "I think it is [100] a very good plan and I think you would benefit more by this than you would the other way."

Q. And did he describe the bonus to you?

A. Yes, he did.

Q. What did he say about it?

A. Well, he says that, well, say, like we work a month and anything that we made during that month to our bonus we would get after that passed, you know, anything that you got over in the production and stuff like that.

Q. Did he say how much that would amount to?

A. No, he says it would be something, and it come out different every month, that it would be figured against the rate of production, it had to be.

Q. Were there any questions by employees?

A. Yes, one.

Q. What was that?

(Testimony of Edward Baca.)

A. If the union does come in will we benefit by this plan anyway.

Q. Was that a question asked by some employee? A. Yes.

Q. By whom? A. Howard.

Q. That is the same Howard that you mentioned before? A. Yes.

Q. And when Howard asked if we will benefit by this plan if [101] the union came in, was there an answer? A. Yes, there was.

Q. What did Mr. Rehrig say?

A. Mr. Rehrig said, he says, "No, you won't."

Q. Do you recall anything else that Mr. Rehrig said in either of these meetings?

A. Not at the moment, I don't.

Mr. O'Brien: That is all.

Trial Examiner Myers: Any questions, Mr. Garrett?

Mr. Garrett: Yes, I have a few.

Trial Examiner Myers: You may proceed.

Cross Examination

Q. (By Mr. Garrett): Mr. Baca, on the occasion of this last speech, the speech Mr. Rehrig made the day before the election, was Mr. Rehrig the only one who spoke at that time?

A. Yes.

Q. Of course, I mean excepting the question you testified was asked from the audience.

A. Yes.

Q. Were any employees present at that time?

(Testimony of Edward Baca.)

A. All except the night crew.

Q. All except the night crew. Had the employees been called together at that time in some way? A. Yes.

Mr. Orloff: Objected to as a conclusion. The witness [102] says he doesn't know whether they were or not.

Trial Examiner Myers: What difference does it make?

Mr. Garrett: That is right. I think you are right, Mr. Orloff.

Q. (By Mr. Garrett): Do you know how the employees came to be called at the time Mr. Rehrig spoke to them on the occasion of this speech the day before the election?

A. I think that was the time Dick gave the speech at noon, right about noon. The machines were stopped and everything at lunch, then he announced that we are going to have a speech from Mr. Rehrig.

Q. Isn't there a loud speaker system there?

A. No, there is not.

Q. How was the announcement made?

A. He stood up on a box or something and just talked right out to the men.

Q. That was Mr. Rehrig, was it? A. Yes.

Q. Mr. Bud Rehrig? A. Yes.

Q. And is that the man who runs the plant there?

A. I think he is the man who owns the plant. I am not sure.

(Testimony of Edward Baca.)

Q. You think he owns it?

A. I think he owns it.

Q. Now, you said that the monthly profits, this bonus would [103] consist of any additional monthly profits, one-half to the company and they were going to distribute one-half back to the employees, is that right?

A. Yes. That is how I understood it.

Q. Answer audibly so the reporter can get it.

And he said that would be only if the union did not come in, is that right? A. Yes.

Q. And that was the question asked him by this Howard, the machinist, right? A. Yes.

Q. Now, in this speech before that Mr. Rehrig made in the early part of the month, the early part of February, he referred to that bonus plan, also, did he, in that speech?

A. No, I don't think he did.

Q. In other words, as far as you know the first mention of the bonus was made by Rehrig just the day before the election, right?

A. No, it had been mentioned before by Richard Gildart.

Q. By Gildart in a speech?

A. No, not a speech.

Q. The only speeches were two speeches by Mr. Rehrig and one by Mr. Kiser, is that right?

A. Yes.

Q. Now, the first speech that Mr. Rehrig made, was that the [104] early part of the month, the early part of February?

(Testimony of Edward Baca.)

A. The first speech?

Q. That is right.

A. I just gave you the date right a while back.

Q. Withdraw the question.

Mr. Rehrig was the only speaker at this meeting the day before the election, is that correct?

A. Yes.

Q. Had there been a meeting before that in the plant with Mr. Rehrig, is that right?

A. Yes.

Q. And that took place the early part of the month, did it? A. Yes.

Q. And that was the one when Mr. Gildart stopped all the machinery and called the meeting?

A. Yes.

Q. And did anyone else speak at this meeting besides Bud Rehrig?

A. No, I don't think so.

Q. What part of the plant was that meeting in?

A. Well, right next to the production line.

Q. Right next to the line. Now, did Mr. Rehrig mention Mr. Gildart in the speech he made at this first meeting? A. Yes, I think he did.

Q. Did he mention that in connection with any bonus plan? [105]

A. Not in the first meeting, no.

Q. Thinking back to that first meeting, Mr. Rehrig was the only one that spoke, is that right, at that meeting? Correct? A. Yes.

Q. And about how long did the meeting last, about?

(Testimony of Edward Baca.)

A. Oh, it must have lasted about 15 or 10 minutes, something like that, 10 or 15 minutes.

Q. After the meeting then did the men go out to lunch?

A. Yes. In fact, we got off a little bit early for lunch that day.

Q. Can you remember what Mr. Rehrig said about the union at that first meeting?

A. Well, that he had heard that we were trying to get the union in, that if we wanted—if that is what we wanted it was all right with him, he didn't have no objections to it.

Q. What else did he say at that time?

A. You got me.

Q. Just think back and try to remember what he said first and what followed. I know that is a long time ago, but just take your time and tell us as well as you can remember what Mr. Rehrig said when he spoke to you on that occasion in the early part of February.

Mr. O'Brien: I see Mr. Gorman was called away. Can we have a brief recess?

Trial Examiner Myers: We will take a five-minute recess. [106]

You may step down.

(Short recess.)

Trial Examiner Myers: On the record.

Mr. Orloff: While we still were discussing the adjournment, I would like to make a statement. I have a matter set for the day following Labor Day, September 4th, which has been continued

three different times. The client is a very old woman and I am a little fearful of how much longer she might be around.

I would like to make the statement now that I would like to have, if possible at that time, if we are not through, a continuance to give me an opportunity to get this other case onto the calendar.

Trial Examiner Myers: How long will you be engaged in that particular case?

Mr. Orloff: I think that that particular case will be about a two-day case. It is a jury case. Two or three days.

Trial Examiner Myers: We will see.

Mr. Orloff: We might finish this before then.

Trial Examiner Myers: Very well. We will stand adjourned now until tomorrow at 9:30 at the request of Mr. O'Brien. All witnesses who have been subpoenaed in this proceeding and who have not been called, including Mr. Baca, are hereby directed to return to this hearing room tomorrow morning at 9:30 without further notice. [107]

(Whereupon, at 3:50 o'clock p.m., Monday, August 27, 1951, the hearing in the above-entitled matter was adjourned until tomorrow, Tuesday, August 28, 1951, at 9:30 o'clock a.m.)

Trial Examiner Myers: Mr. O'Brien, are you ready to proceed?

Mr. O'Brien: We are ready.

Trial Examiner Myers: Mr. Garrett, are you ready to proceed?

Mr. Garrett: We are ready.

Trial Examiner Myers: Mr. Orloff, are you ready to proceed?

Mr. Orloff: We are ready.

Mr. O'Brien: I note the absence of Mr. Gorman this morning. I just telephoned his office and was informed by the young lady who answered that he had gone to court. She didn't know what court and I asked her if he was coming to this proceeding and she did not know.

In view of this, I suggest that we proceed in the absence of Mr. Gorman.

Trial Examiner Myers: Is there any objections to proceeding in the absence of Mr. Gorman?

Hearing no objections, we will proceed.

Mr. O'Brien: Mr. Examiner, there is one other matter. I submitted to Mr. Orloff yesterday the group of authorized cards and I would like to inquire through the Examiner what his check showed.

Mr. Orloff: The cards, being 5a through 5tt, were [112] examined against records at Rehrig-Pacific Company and it would appear that the signatures on the cards are signatures of the persons who have signed other documents in possession of Rehrig-Pacific Company.

There is one exception, the Exhibit 5qq, which bears the name of Rafael Barron Ruiz and appears to be signed by Rafael Barron. As to that particular card, we have no signature on file, but we believe it to be the person known on the payroll and in our records as Rafael Barron Ruiz de Velasco. We think that perhaps the signature is all right.

Mr. O'Brien: On that statement by counsel I offer General Counsel's Exhibit No. 5 in evidence.

Trial Examiner Myers: Any objections?

Mr. Orloff: No objections.

Mr. Garrett: No objections.

Trial Examiner Myers: There being no objections, the cards are received in evidence and I ask the reporter to kindly mark them as General Counsel's Exhibits 5a through and including 5tt.

(The documents heretofore marked General Counsel's Exhibits Nos. 5a through 5tt for identification were received in evidence.)

Trial Examiner Myers: Will you please resume the witness stand? [113]

EDWARD BACA

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Trial Examiner Myers: Is there a pending question?

Mr. O'Brien: The witness was being interrogated by Mr. Garrett and there was a pending question.

Trial Examiner Myers: Will the reporter please read the last question.

(The question was read as follows: "Q. Do you remember what Mr. Rehrig said? Just think back and try to remember what he first said and what followed. I know that is a long

(Testimony of Edward Baca.)

time ago, but just take your time and tell us as well as you can remember what Rehrig said when he spoke to you on that occasion in the early part of February.'')

The Witness: He said he had heard from Gildart that we were thinking of bringing the union in. He also said it was all right by Mr. Rehrig if the union did come in. He said he didn't have nothing against it, it was just that he wanted us to think about it stronger and be sure what we wanted.

Q. (By Mr. Garrett): That was the first speech he made? A. Yes.

Q. Did he say anything else about whether or not it was good to have the union? [114]

A. No, he didn't say that in the first speech. I think it was in the second one when he said that.

Q. Now, when Gildart went through the shop with this book and talked to you, did you get a look at the book he had in his hand?

A. I didn't see the names he had on it.

Q. What did you see?

A. I saw my name.

Q. Did you see your name? A. Yes.

Q. Did you see other names?

A. I seen other names.

Q. Were they names of employees or were any of them names of employees?

A. I couldn't say.

Q. Did he tell you what he was doing?

A. No, he just asked me that question.

(Testimony of Edward Baca.)

Q. Then did he make a note in the book?

A. Yes, he checked if off.

Q. Could you see check marks on some of the other names?

A. No, he just came up rather suddenly and he asked me and didn't give me very much of a chance to answer. He said, "Oh, you are for the union, anyway," something like that.

Q. How long did you stay at the plant after the election?

A. It must have been one or two days after.

Q. Did you have any regular payday there after the election or just a payoff?

A. Well, it was a regular payday of what I had coming, that was all.

Q. Just your closing pay? A. Yes.

Q. Were the other men paid on that same day?

A. No, it was after payday. I had went to Riverside and I came back and got my check.

Mr. Garrett: No further questions.

Trial Examiner Myers: Mr. Orloff, do you have any questions of this witness?

Cross Examination

Q. (By Mr. Orloff): The day you got your pay was a regular payday? A. No.

Q. You didn't get your pay on a regular payday?

A. I don't think so. I don't remember now.

Q. What is your answer, that you didn't or that you don't remember?

(Testimony of Edward Baca.)

A. Well, let me think about it. Now, I remember, I went to Riverside and came back and it was after everybody had gone.

Q. It was on a payday but everyone else had gone? A. Yes, because I got there late.

Q. You say you were there a day or so after the election? [116] A. I think so.

Q. Isn't it a fact that you never worked another day after the election?

Trial Examiner Myers: You mean for the company?

Mr. Orloff: At Rehrig-Pacific Company?

The Witness: I think I did.

Q. (By Mr. Orloff): Now, irrespective of whether you worked any after the election or not, did your employment terminate as a result of the Rehrig-Pacific Company advising you that you had been fired, or did you terminate it yourself?

A. I quit.

Q. You just quit? A. Yes.

Q. No one requested you to quit?

A. No.

Q. That was a matter of your own idea?

A. Sure.

Q. And when you made up your mind you were going to quit you didn't come back to work. When the next payday came on you came around to get your check?

A. Well, I went to Riverside and I told Richard Gildart I was going to Riverside.

Q. You took a job in Riverside?

(Testimony of Edward Baca.)

A. No, I moved back to Riverside.

Q. You moved your residence back to Riverside? [117] A. Yes.

Q. You came back and told Richard you weren't coming back to work? A. That is right.

Q. How long after you ceased to work at the Rehrig-Pacific Company was it you came back to tell Richard that you had moved to Riverside?

A. Well, I hadn't worked for about two days before payday and I think I told him when I came back for the check.

Q. When you came back to pick up your check you told him? A. Yes.

Q. At that time it had been two days you had not worked? A. Yes.

Q. When did you sign a card for this woodworkers local?

A. To tell you the truth, I didn't sign one. That was just a mistake I made there.

Q. You first talked with Mr. Rife, is that correct? A. Yes.

Q. That was on or about the 24th or 25th of January? A. Yes.

Q. 1951? A. That is right.

Q. Then you gave a list to Mr. McKinzie on the following Monday? A. Yes. [118]

Q. That would be the 29th? A. Yes.

Q. Now, between the day that you first saw Mr. Rife and the 29th, the following Monday, did you see him again?

A. I seen him—I think he contacted me on a

(Testimony of Edward Baca.)

Thursday and I seen him Friday morning.

Q. You saw him again the following day after you first saw him? A. Yes.

Q. At that time did he give you any cards?

A. No, he didn't.

Q. Had you received any cards from anyone at that time?

Mr. O'Brien: I don't know whether the reporter saw him shake his head.

Trial Examiner Myers: You better answer out loud.

Q. (By Mr. Orloff): Did you see anyone pass out any cards prior to this time when you saw Mr. Rife on the following morning?

A. Not in the morning, I don't think.

Q. Did you see Mr. Rife again that same day?

A. At noon.

Q. You saw him in the morning and again at noon? A. Yes.

Q. Did you see anyone else with him?

A. I think there was—I don't remember which ones were [119] there of the union men. I know Mr. Rife was there. I am not too sure, but I think Mr. Cordil and Mr. McKinzie were there.

Q. You are not sure whether they were there or not? A. No, I am not.

Q. At noon when you saw Mr. Rife, this is the day following the day you first met him, did Mr. Rife give you any cards? A. Yes.

Q. He gave you some cards on that day?

A. Yes.

(Testimony of Edward Baca.)

Q. That was before you gave the list to Mr. McKinzie? A. That is right.

Q. Now, when you gave the list to Mr. McKinzie, did he give you some cards?

A. No, I didn't give him the list until Monday.

Q. You gave Mr. McKinzie the list on Monday?

A. Yes.

Q. Had you ever met him before that?

A. Yes.

Q. When did you meet him?

A. On that Friday I told you about. I told you Mr. Cordil and Mr. McKinzie — I don't know whether Mr. Cordil was there.

Q. But Mr. McKinzie was there?

A. Yes.

Q. Then on Monday you gave the list to Mr. McKinzie? A. Yes. [120]

Q. Did Mr. McKinzie give you some cards at that time?

A. I think he did give me some more cards.

Q. Did you ask him for some? A. No.

Q. He gave you some?

A. I told him I already had some.

Q. He gave you some more?

A. He gave me some in case I didn't have enough, he said.

Q. Now, you had two or three conversations with Mr. Gildart, is that right?

A. Yes, about two of them.

Q. Two conversations with Mr. Gildart, in his office?

(Testimony of Edward Baca.)

A. One in his office and one in the back room behind the machine room.

Q. Call your attention to the second one near the machinists' room or machine room, whichever it was, in which you told Mr. Gildart, Mr. Coffee——

Trial Examiner Myers: Not Mr. Coffey.

The Witness: Yes, that is his name.

Mr. Orloff: You know whom I have reference to?

Q. (By Mr. Orloff): Howard, the machinist?

A. Yes.

Q. And yourself? A. Yes.

Q. Was anyone else present at that conversation? [121]

A. I don't know. There was four of us.

Q. Just the four of you? A. Yes.

Q. At that conversation I believe you testified that Mr. Gildart said to you, the other representatives and yourself, "Go see Mr. Kiser and Mr. Rehrig and if necessary I will take you up to see Mr. Rehrig"? A. Yes.

Q. And you said, "There are so many changing their minds I don't know what I want to do"?

A. That is correct.

Q. When you say, "There are so many changing their minds," did you mean the employees?

A. Yes.

Q. These were the employees you had been talking with? A. Yes.

Q. That was about early February. Was that

(Testimony of Edward Baca.)

before or after the first speech that Mr. Rehrig made?

A. I think it was—I don't quite remember, but I think it was after.

Q. You are not sure?

A. No, I am not too sure.

Q. It might have been a day or two before or a day or two after? A. Yes. [122]

Q. It could have been either one?

A. Yes.

Q. Was it before or after, if you remember, the date that you saw Richard going through the shop with the black book? The day he talked to you and made a check mark by your name?

A. The day before or after Mr. Rehrig——

Q. No, the conversation with Mr. Gildart back by the machinists' room, was that before or after Mr. Gildart made the check mark on your name?

A. I think it was after, I am not sure.

Q. Was it after he had gone through the shop?

A. Yes.

Q. Now, the trip that Mr. Gildart made through the shop when he talked with you and put a check mark after your name, was that prior to the time that Mr. Rehrig made his first speech?

Mr. Baca, I am not trying to confuse you. If you don't remember, just say so. I am not trying to get you to say anything that isn't so. I just want to know what the facts are and the order of sequence how these occurred. If you don't recall and want to say that, don't be afraid to say it.

(Testimony of Edward Baca.)

A. I think I said it yesterday, but I can't remember how it was.

Q. Well, let's see if we can put them in sequence. You met with Mr. Rife the 24th or 25th?

A. Yes. [123]

Q. You gave the list to Mr. McKinzie the following Monday? A. Yes.

Q. You had a conversation with Mr. Gildart?

A. Yes.

Q. A few days after that?

A. Around there.

Q. Then did Mr. Gildart come through with the book or did you have Mr. Rehrig's speech before that, or did you have another conversation with Mr. Gildart?

A. I had another conversation with Mr. Gildart before he came through the plant.

Q. Yes, I know. Then after that what was the next thing? Was Mr. Rehrig's speech the next thing or was Mr. Gildart's trip through the plant, or was the conversation with Mr. Gildart the next thing? Tell us which one, if you can.

A. Let's see. I had the talk with Gildart, then that is when he went around with the book. Following that—not the same day, maybe a day or so later—we had the talk by Mr. Rehrig, I think it was.

Q. You had a talk by Mr. Rehrig?

A. Yes.

Q. Then at another time you had a conversation with Mr. Gildart? A. Yes.

(Testimony of Edward Baca.)

Q. That was after the speech? [124]

A. Yes.

Q. At the time that you had Mr. Rehrig's speech, did someone introduce him or did he just come out? A. Everybody knows who he is.

Q. He came out of the office and got up on the box and started to talk?

A. Well, yes — no, Richard said Mr. Rehrig wanted to speak to us boys.

Q. That is all he said? A. Yes.

Q. Then Mr. Rehrig got up on the box and started to talk? A. That is right.

Q. Was that the way it happened both times?

A. No, I don't think so. The second time I think it was that Mr. Rehrig says, "I would like to have a few words with you boys before you go home," or "before you go to eat."

Trial Examiner Myers: Did Mr. Rehrig speak English?

The Witness: In both.

Trial Examiner Myers: What do you mean?

The Witness: In Spanish and in English.

Trial Examiner Myers: He spoke in English that day? I am talking about the first day, the first speech he made.

The Witness: It was in English.

Trial Examiner Myers: Did anyone translate it into Spanish? [125]

The Witness: I don't think so.

Trial Examiner Myers: What about the second speech?

(Testimony of Edward Baca.)

The Witness: The second one I think Richard Gildart interpreted for him.

Trial Examiner Myers: Mr. Rehrig spoke in English?

The Witness: Yes.

Trial Examiner Myers: Mr. Gildart translated it into Spanish?

The Witness: Yes.

Trial Examiner Myers: While Mr. Rehrig was there?

The Witness: Yes.

Q. (By Mr. Orloff): Now, Mr. Baca, in answer to the Examiner's first question as to how he spoke, you said he spoke both in English and Spanish. Did Mr. Rehrig also speak Spanish?

A. I have heard him speak it some.

Q. You say you have heard him speak it?

A. More or less to the boys there.

Q. Does he speak it fluently? Is he able to express himself in Spanish?

A. It sounded to me like he could. I don't know whether he can, but in talking to some of the boys he talks pretty good.

Q. In talking to the boys he is able to make himself understood? A. Yes.

Q. He is able to understand them?

A. Yes. [126]

Trial Examiner Myers: Do you know while you were working there whether there were any employees who could not speak or understand English?

(Testimony of Edward Baca.)

The Witness: Yes, there were.

Trial Examiner Myers: About how many? There were 60 employees there. What was the percentage, how many would you say there were that could not speak nor understand English?

The Witness: There must have been more than five of them, but not more than ten.

Q. (By Mr. Orloff): Five or ten or between five and ten?

A. Yes, around there. I couldn't tell you exactly.

Mr. Orloff: That is all.

Trial Examiner Myers: Any redirect examination?

Mr. O'Brien: Yes.

Redirect Examination

Q. (By Mr. O'Brien): Did you ask any of the boys who understood no English to sign cards?

A. That understood no English to sign cards? Yes, I did.

Q. And did you explain to them in Spanish what the card was for? A. Yes.

Mr. Orloff: To which we will object as being hearsay.

Trial Examiner Myers: Overruled. You may answer.

The Witness: I told them what the card was for. They asked me what the card was for. It was more or less a proof [127] they wanted the union to come in for them. I told them to sign it if they wanted to and when they signed it to make sure

(Testimony of Edward Baca.)

they signed it at the bottom and make sure they signed their right name. A lot of them asked me how to sign the cards and I showed them how, what to put down on the lines there.

Mr. O'Brien: That is all.

Trial Examiner Myers: Any questions, Mr. Garrett?

Mr. Garrett: No questions.

Trial Examiner Myers: Any recross examination, Mr. Orloff?

Recross Examination

Q. (By Mr. Orloff): Did you tell any of them if they didn't sign it they wouldn't have a job after the union came in? A. No, heck no.

Q. You didn't tell that to anybody?

A. No.

Q. Not even to Joe Perales? Do you know Joe Perales?

A. Joe Perales? I can't remember who he was. If you describe him to me I will remember.

Q. He is a truck driver and does repairs.

A. Oh yes, the truck driver. Yes, I know who he is.

Q. Did you tell him if he didn't sign the card that when the union came in he would be out of a job? A. No, I seldom ever spoke to him.

Q. Did you tell him you would blackball him with the dairy and he couldn't drive for them either? [128] A. Me tell him that? No.

Mr. Orloff: No further questions.

Trial Examiner Myers: You are excused. Thank you very much.

(Witness excused.)

Trial Examiner Myers: We will take a five-minute recess.

(Short recess.)

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. O'Brien: We are ready, Mr. Examiner.

Trial Examiner Myers: Mr. O'Brien, will you call your next witness?

Mr. O'Brien: Mr. Marquez.

Trial Examiner Myers: Will you step forward and be sworn.

FRANK L. MARQUEZ

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Mr. Frank L. Marquez.

Trial Examiner Myers: Will you kindly spell your last name for the record. [129]

The Witness: M-a-r-q-u-e-z.

Trial Examiner Myers: Where do you live?

The Witness: 5319 East Sheila Street, Los Angeles.

Trial Examiner Myers: You may be seated.

(Testimony of Frank L. Marquez.)

Mr. O'Brien, you may proceed with the examination of Mr. Marquez, who has been duly sworn.

Q. (By Mr. O'Brien): Where do you work, Mr. Marquez? A. Rehrig-Pacific.

Q. How long have you worked there?

A. I have been there since last November.

Q. November 1950? A. Yes.

Q. I show you General Counsel's Exhibit No. 4 and call your attention to the sixth name on the list. Is that your signature, sir? A. Yes.

Mr. Orloff: We stipulate that it is.

Q. (By Mr. O'Brien): Where did you sign it?

A. On East 26th Street.

Q. Why did you sign it?

Mr. Orloff: Objected to; the document is the best evidence as to what it is.

Trial Examiner Myers: Overruled.

Q. (By Mr. O'Brien): Why did you sign it, sir?

A. Because after talking to Mr. Baca we thought we would [130] enter the union, so I signed it.

Trial Examiner Myers: Do you have the application card? Wouldn't that be better?

Mr. O'Brien: This will help to fix the time.

Trial Examiner Myers: Time of what?

Mr. O'Brien: Of the other incidents which occurred.

Q. (By Mr. O'Brien): Did you hear a speech by Mr. Rehrig shortly after you signed this list?

A. I heard a talk by Mr. Rehrig one day prior to the election.

(Testimony of Frank L. Marquez.)

Q. Some day before the election. What day before the election? A. What was that?

Q. How long before the election?

A. One day.

Q. About what time of day was that?

A. 3:15 p.m.

Q. Who was present besides Mr. Rehrig? I don't mean the names, but what employees or group?

A. Well, all the employees that work on the day shift.

Q. What did Mr. Rehrig say?

A. Mr. Rehrig told us that tomorrow would be a big day, that whether we signed to get into the union or not—that he didn't have anything against the union or for the union. He said it was immaterial, that it was entirely up to us. [131] He introduced the bonus plan, the profit sharing.

Q. What did he say about the bonus or profit-sharing plan?

A. He said each employee would get approximately $17.50 monthly and that the rest would go into a private bank listed as employees' personal property.

Q. What else did he say?

A. He said that he wished that we would give his plan a trial before we went union.

Q. Did any employees have any questions?

A. I don't recall of any having any questions. During this talk he was interrupted by Howard Telke. Howard Telke stated if we went union would

(Testimony of Frank L. Marquez.)

we still get the bonus, and Mr. Rehrig said no, they would be entirely on their own.

Q. After the election, did you get the bonus?

A. Yes.

Q. Did Mr. Rehrig make any speeches to the employees after the election?

A. Yes, I recall, but I don't recall the exact date.

Q. Can you recall where it took place?

A. Yes, out in the back of the plant.

Q. About what time of day?

A. At 10:00 o'clock every day we get a ten-minute break. It was during this break that we had it.

Q. What did Mr. Rehrig say?

Mr. Orloff: To which we will object as being immaterial. [132] The complaint alleges a particular time as to the unfair labor practice, and now we are getting into a time sometime after the election, which date is much later than anything else in the complaint.

Trial Examiner Myers: Overruled. You may answer.

The Witness: Well, Mr. Rehrig said that he didn't know at the time he made his talk that it was against the law for him to talk prior to the election. He cussed the government and he said some things I would rather not say, and he closed it. The ten minutes were up and we went back into the shop to work.

Q. (By Mr. O'Brien): Do you recall any other

(Testimony of Frank L. Marquez.)

speeches made by Mr. Rehrig before the election, besides the one you told us about?

A. No, I don't.

Q. Do you know Mr. Gildart?

A. Yes, I do.

Q. Did you see him going through the plant with a book? A. I did.

Q. About when, sir?

A. It was sometime between the time we signed the cards and the election.

Q. What did you see?

A. I saw him with a book in his hand and he would get next to an employee and talk to him.

Q. Did he speak to you?

A. No, he didn't.

Q. Did you ever see the book close up?

A. Yes.

Q. What did you see in the book?

A. I saw my name.

Q. Did you see any other names?

A. Yes, I did.

Q. In general, were they the names of employees? A. Yes, they were.

Q. Did anything appear opposite your name?

A. No, nothing after my name. It was a blank.

Q. Did anything appear opposite other names?

A. Some of them, yes.

Q. What did you see opposite some of the names? A. Check marks.

Q. Is that all you saw?

A. That is right.

(Testimony of Frank L. Marquez.)

Q. Were all the check marks the same?

A. Yes, approximately. Some were different.

Q. The different ones were indicated how?

A. The check marks were in red pencil and there was just a regular check, and the other names were blanks.

Q. Is there a blackboard in the shop?

A. Yes, there is. [134]

Q. And for what purpose is the blackboard used, generally?

A. It is generally used for when Mr. Gildart writes down whether he wants the boys to return to work, or the time they are quitting, things like that.

Q. Within the last week or so has there been any other notice on the bulletin board other than a notice from Mr. Gildart?

Mr. Orloff: To which we object as being too remote and having no bearing on the issues here.

Trial Examiner Myers: Overruled. Are you going to fix a time?

Mr. O'Brien: Yes.

Q. (By Mr. O'Brien): Will you answer the question yes or no?

A. Yes, there was a notice on that board.

Q. When did the notice first appear, if you recall? A. It appeared last week.

Q. And how long was it there?

A. Approximately three days.

Q. What was that notice?

A. It was a statement——

(Testimony of Frank L. Marquez.)

Mr. Orloff: To which we object. The notice would be the best evidence.

Trial Examiner Myers: Overruled. You may answer.

The Witness: The statement, to the best of my knowledge, was like this: "We need $100.00 for lawyer's fees. $2.00, more [135] or less; seal it in an envelope and drop it in the box."

Then underneath that it was written in Spanish, too.

Trial Examiner Myers: The same thing?

The Witness: Yes.

Trial Examiner Myers: Can you read Spanish?

The Witness: Yes, I can.

Q. (By Mr. O'Brien): There was a box there?

A. There was.

Q. And was there anything else on this blackboard besides the notice you have just described?

A. No, that was the only thing there.

Q. Have you told us everything you can remember about Mr. Rehrig's speech the day before the election?

A. To the best of my knowledge, yes.

Q. Do you remember him saying anything about a wage freeze? A. Yes, he did.

Q. Does that bring anything back to you that you forgot to tell us before?

A. Well, he said that there was a wage freeze and that we all read the newspapers and that he could not give us a raise at the present time.

Q. Does anything more come back to you now?

(Testimony of Frank L. Marquez.)

A. I don't recall, except that in closing his talk, he said, "God bless you." That is all.

Q. Do you recall him saying anything about what would happen [136] to the shop if it would go union?

Mr. Orloff: Objected to as being leading and suggestive. He asked him if he remembered anything else and he said no.

Trial Examiner Myers: He is refreshing his recollection. Overruled.

Q. (By Mr. O'Brien): That can be answered yes or no. Did my question suggest anything else to you? A. Yes.

Q. Do you now remember something you forgot to tell us before?

A. Mr. Rehrig stated that the cost of bringing the lumber into the shop—he went to a lot of expense; and that is all I can remember.

Mr. O'Brien: That is all.

Trial Examiner Myers: Mr. Garrett, any questions?

Q. (By Mr. Garrett): Mr. Baca, this hearing here began yesterday, Monday, and you say that sign about the $100.00 for lawyer's fees was on the blackboard at the shop last week. Was it on the blackboard there as early as a week ago yesterday? Was it on the blackboard Monday of last week?

A. Yes, I believe that was the time I saw it for the first time.

Q. When you came to work on Monday?

A. That is right.

(Testimony of Frank L. Marquez.)

Q. (By Trial Examiner Myers): Was it there all week? [137]

A. No, it wasn't.

Q. How long was it there?

(No response.)

Q. (By Mr. Garrett): When was it taken off, do you recall? Was it taken off as late as Friday, the last day you worked last week?

A. No, it wasn't there Friday morning.

Q. It had been there Thursday night, had it not?

A. Yes, it had.

Q. Was this sign about this $100.00 for lawyer's fees written, typewritten, or in handwriting?

A. That I don't recall. I know it was written there.

Q. Was there any other sign on this bulletin board during the time the sign about the $100.00 for lawyer's fees was there?

A. Any other sign besides that? No, that was the only thing there.

Q. How large is that bulletin board?

A. I imagine about 26 by 36.

Q. Inches? A. Right.

Q. Where is it located in the plant?

A. It is located in front of the machine shop.

Q. And is it located in a hallway there?

A. Yes. [138]

Q. Is that the hallway all the employees have to use in going in and out? A. Right.

Q. Did you recognize the writing on that sign as being that of Mr. Gildart?

(Testimony of Frank L. Marquez.)

Mr. Orloff: To which we object as calling for the testimony of an expert witness.

Trial Examiner Myers: I sustain the objection.

Q. (By Mr. Garrett): Do you know Mr. Gildart's handwriting?

A. I know it if I see him writing it, but I wouldn't say who put the sign up there.

Q. Did it appear to you to be the same writing as that which had been used on the blackboard for previous signs?

Mr. Orloff: Objected to as not being expert testimony and no comparison.

Trial Examiner Myers: Overruled. You may answer.

The Witness: No, I couldn't say, Mr. Garrett.

Q. (By Mr. Garrett): Did Mr. Rehrig in his speech say anything about a 10-per cent increase being allowed under the wage freeze?

Mr. Orloff: Objected to as being leading. He was asked what he remembered about the wage freeze, and this certainly cannot be classed as something to refresh his recollection.

Mr. Garrett: No, this is cross examination.

Trial Examiner Myers: Reframe your question.

Q. (By Mr. Garrett): Isn't it a fact that in his speech Mr. Rehrig said there was a 10 per cent increase allowable under the wage freeze?

A. Yes, he did say.

Q. Did he say anything about paying the 10 per cent to the employees?

(Testimony of Frank L. Marquez.)

Mr. Orloff: I object to that. He is testifying to each item as he goes down the line.

Trial Examiner Myers: Overruled. You may answer.

Will the reporter please read the question to the witness?

(Question read.)

The Witness: As far as I remember, he said he could not pay it, that he could not give us a raise.

Mr. Garrett: No further questions.

Trial Examiner Myers: Mr. Orloff, do you have any recross examination?

Cross Examination

Q. (By Mr. Orloff): Mr. Marquez, you said you signed a list, General Counsel's Exhibit No. 4, after talking to Mr. Baca, I believe you said. Is that correct?

A. A-huh, that is correct.

Q. Did you talk to anyone else prior to signing that list?

A. Did I talk to anyone prior to signing the list? To Eddie, Mr. Baca.

Q. Besides Mr. Baca. [140]

A. Not that I remember.

Q. Did you have any talks with Mr. McKinzie or Mr. Rife, Mr. Cordil or Mr. Starkey?

A. Prior to signing the cards, no.

Q. Not prior to that. Did you talk with them afterwards? A. Yes.

Q. Did they promise you a job somewhere else

(Testimony of Frank L. Marquez.)

if you helped them get the union organized there?

Mr. O'Brien: I will object to the question.

Trial Examiner Myers: Overruled. You may answer.

The Witness: Yes, they promised me a job.

Q. (By Mr. Orloff): After the union was defeated in the election, did you have a talk with them about that job? A. Yes, I did.

Q. Did they tell you it was just tough, they weren't going to give it to you? A. No.

Q. What did they say to you?

A. They said they could put me to work.

Q. They said they could put you to work. Did you ask them to? A. No.

Q. Did they ever ask you to go to work on another job? A. No, they didn't.

Q. On this occasion that you saw Mr. Gildart going through [141] the plant, he did not talk with you? A. No.

Q. Did you overhear anything that he said to anyone else? A. No, I did not.

Q. You don't know what he said to them?

A. No, I don't.

Q. Can you tell me about when that was with reference to the time that you signed the card?

A. Well, as I said before, it was between the time we signed the cards and the election.

Q. That was about three weeks. Could you tell us whether it was closer to the time you signed the cards or closer to the election?

A. No, I can't.

(Testimony of Frank L. Marquez.)

Q. Were you present each working day at the plant from February 1st to February 23rd?

A. No, I cannot say that I was present.

Q. You don't know whether you missed any time or not?

A. No, I couldn't say that I was present every day because there was some time—I lost two days because my father was sick and I had to go to San Diego to see him.

Q. You missed two days from February 1st to February 23rd. Sometime in that period you missed two days?

A. I couldn't say whether it was in that period or after the election. [142]

Q. But the occasion that you missed the two days was because of the trip to San Diego on account of your father's illness? A. Yes.

Q. Assuming that that time, the two days that you missed, was after the election, did you miss any other time for any other reason?

A. Oh, yes.

Q. During the period from February 1st to February 23rd, 1951?

A. February 1st to the 23rd?

Q. Yes. A. I don't recall that I did.

Q. It is your best recollection that you were there each working day? A. Right.

Q. When you saw this book, some of the names had a check mark and some of the names were blank? A. Right.

Q. Were those that had check marks all the

(Testimony of Frank L. Marquez.)

same? Were all the check marks the same wherever there was a check mark?

A. Approximately, yes.

Q. In other words, just as if a fellow took a pencil and made a mark; as nearly the same as it would come out in writing in a normal manner?

A. Right.

Q. Were you able to see all the names in the book?

A. No, I just looked after my own personal name.

Q. So all you saw was a few names, perhaps, above yours and below yours? A. Right.

Q. Was there more than one page in the book?

A. Yes.

Q. With names on it? A. Yes.

Mr. Orloff: That is all.

Trial Examiner Myers: Any redirect, Mr. O'Brien?

Mr. O'Brien: No further questions.

Trial Examiner Myers: Any questions, Mr. Garrett?

Mr. Garrett: Yes.

Redirect Examination

Q. (By Mr. Garrett): About this promise of a job that you were offered after the election, did you get that from one of the men from the union?

A. Yes.

Q. And was that promise made to you in this way: That if you feared you would lose your job

(Testimony of Frank L. Marquez.)

as a result of the attempt to bring the union in, that they would take care of you with a job somewhere else?

A. No. Mr. McKinzie reminded me that, regardless of the [144] outcome, I would be taken care of.

Q. With employment? A. Right.

Q. Either at the Rehrig-Pacific plant or somewhere else, is that correct? A. Right.

Q. They would attempt to get you a job somewhere else if you didn't stay at Rehrig-Pacific, was that the promise? A. Right.

Q. I take it that during the period from February 1st to February 23rd, this year, you punched a time card every day you were there?

A. That is right.

Q. These time cards are collected, are they, by Mr. Kiser or one of his assistants? A. Yes.

Q. As far as you know, they are kept by the company? A. Yes.

Q. If you had these time cards available, you could tell us what working days you missed, if you missed any, is that correct?

A. Yes, I could.

Mr. Garrett: No further questions.

Trial Examiner Myers: Any further questions, Mr. Orloff? [145]

Recross Examination

Q. (By Mr. Orloff): Mr. Marquez, Mr. Garrett asked you if you had this conversation about a

(Testimony of Frank L. Marquez.)

job after the election. Wasn't it before the election?

A. We had some discussions about it before the election and after the election.

Q. And was it before the election that they told you that they would get a job somewhere else?

A. After the election?

Q. Before the election. A. Yes.

Mr. Orloff: That is all.

Trial Examiner Myers: Any further questions?

Redirect Examination

Q. (By Mr. Garrett): It was before the election that they told you they would get a job for you after the election?

A. They told me I would be taken care of before and after.

Mr. Garrett: That is all.

Trial Examiner Myers: You are excused. Thank you very much.

(Witness excused.)

Trial Examiner Myers: Mr. O'Brien, will you call your next witness?

Mr. O'Brien: Richard Valverde.

Trial Examiner Myers: Will you step forward and be sworn? [146]

RICHARD VALVERDE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

(Testimony of Richard Valverde.)

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Richard Valverde.

Trial Examiner Myers: Will you spell your last name for the record, please?

The Witness: V-a-l-v-e-r-d-e, Valverde.

Trial Examiner Myers: Where do you live?

The Witness: 306 Baker Street, Los Angeles.

Trial Examiner Myers: You may be seated.

Mr. O'Brien, you may proceed with the examination of this witness, who has been duly sworn.

Q. (By Mr. O'Brien): I show you General Counsel's Exhibit No. 4, and ask you to look at the tenth name on the list. It that your signature?

A. Yes.

Q. What was your purpose——

Mr. Orloff: To which we object, as to what the purpose was.

Trial Examiner Myers: Sustained.

Q. (By Mr. O'Brien): What did you think you were signing?

Mr. Orloff: Object to as being immaterial. The document speaks for itself. [147]

Trial Examiner Myers: Overruled.

The Witness: Well, I wanted to sign the card because I wanted to get more money for the work I was doing there. I talked to Mr. Baca about it and he said if I wanted to sign, to sign. So I signed the card and the rest of the boys signed it, too.

Q. (By Mr. O'Brien): What did Mr. Baca say it would be for?

(Testimony of Richard Valverde.)

Mr. Orloff: Object to as calling for hearsay.

Trial Examiner Myers: Overruled.

The Witness: To get organized.

Trial Examiner Myers: I thought you were putting this in for the purpose of fixing some dates.

Q. (By Mr. O'Brien): Do you know, approximately, when you signed that list, sir?

A. No, I don't sir.

Q. Where are you employed now?

A. Rehrig-Pacific.

Q. How long have you worked there?

A. About four and a half years, around there.

Q. Do you recall a Labor Board election that was held last spring? A. Yes.

Q. The election for a union? A. Yes.

Q. Before the election did you hear Mr. Rehrig make a speech [148] to the employees?

A. Yes, I did.

Q. How long before the election?

A. One day before the election.

Q. What did Mr. Rehrig say?

A. Well, he talked about what he made in the company, how much the lumber cost, and everything, and he told us to think before we signed, whether to vote for the union. He was talking about his plan, to try and think about his plan, to see how it worked. If they wanted a bonus system or whether they were for the union. He said he would give us 25 per cent of the bonus, of the profit of the company. If the company made $25,000.00, we would get $5,000.00 among the people there.

(Testimony of Richard Valverde.)

He talked there and I can't remember any more about that.

Q. After the election did you get the bonus?

A. Yes.

Q. How long after the election?

A. We got the bonus the next month, the 15th.

Q. Are you still getting it?

A. Yes, we do.

Q. Did Mr. Rehrig make any announcement after the election about the bonus?

A. Yes, he did.

Q. How did he make that announcement?

A. On the rest period about a week later, after the election. [149]

Q. What did he say?

A. He said to think it over, he wanted the boys to be satisfied with what they were going to get, and to try out his plan or vote for the union. He said he wasn't against the union.

Trial Examiner Myers: What did he say after the election?

The Witness: Well, he talked to the boys there, to think it over, what they were going to sign. I can't recall.

Q. (By Mr. O'Brien): Was that after the election, sir? A. Yes.

Q. Do you recall any other speech that Mr. Rehrig made before the election? A. No, I don't.

Q. Other than the one you told us about, the day before the election? A. Yes.

Q. Do you recall any other person making a

(Testimony of Richard Valverde.)

speech to all of the employees before the election?

A. No, I don't.

Q. Did you see Mr. Gildart going through the plant with a little book? A. Yes, I did.

Q. Did he speak to you on that occasion?

A. Yes, he did.

Q. What did he say to you? [150]

A. He said if I wanted to go for the company or vote for the union. So I told him I wanted the union, and he checked my name with a little mark there.

Q. And when was that, sir?

A. I can't recall.

Q. Was it after you signed this list for Eddie Baca? A. Yes, it was.

Q. Was it before the election?

A. Yes, it was.

Q. Have you told us everything you can remember about his speech before the election?

A. Yes, I have.

Q. In that speech did he say anything about living up to the union rates?

A. Yes, he did.

Q. Does that bring something back to you that you forgot to tell us? A. Yes.

Q. What did he say?

A. He said he would try to live up to the rates if the company could pay, and if he couldn't do it, he would close the plant down and work two days a week.

Mr. O'Brien: That is all.

(Testimony of Richard Valverde.)

Trial Examiner Myers: Mr. Garrett, any questions?

Mr. Garrett: No questions. [151]

Trial Examiner Myers: Mr. Orloff?

Cross Examination

Q. (By Mr. Orloff): You said on this occasion that Mr. Gildart went through the shop was before the election and after the list was signed, is that correct? A. Yes.

Q. After the list was signed and before the election? A. Well, I can't be sure about that.

Q. Well, in answer to a question of Mr. O'Brien's, you said on that occasion Mr. Gildart went through the plant and asked you if you were for the union and you told him yes and he put a check mark in the book—you said that that was before the election. That is correct, isn't it? A. Yes.

Q. It was after the list that you signed. That is correct, isn't it? A. Yes.

Q. You also told us that the day before the election Mr. Rehrig made a speech, is that correct?

A. Yes.

Q. Now, did Mr. Gildart go through the plant before Mr. Rehrig made this speech? Not necessarily the same day, it could have been a day or two or a week before, any time before he made the speech. Do you understand what I am asking you? Was it before the speech was made? [152]

A. I think it was.

Q. Mr. Valverde, prior to the election did Mr.

(Testimony of Richard Valverde.)

McKinzie or one of the other men from the union offer you a job elsewhere? A. They did.

Q. If you would vote for the union?

A. No.

Q. They did offer you a job some place else?

A. Yes.

Mr. Orloff: That is all.

Trial Examiner Myers: Any redirect examination, Mr. O'Brien?

Redirect Examination

Q. (By Mr. O'Brien): Do you recall where this conversation with Mr. McKinzie took place?

A. Outside the plant there.

Q. Who was present?

A. Mr. Marquez was out there with me, and some of the other boys.

Q. Mr. Marquez and Mr. McKinzie and you?

A. Yes.

Q. Anyone else? A. I can't recall.

Q. What did you say to Mr. McKinzie and what did he say to you?

A. Well, he talked about the union, to get organized, somebody [153] to back us up. He talked there and at the noon hour, then he went.

Q. I am referring to this specific conversation that Mr. Orloff asked you about. Did you have a question that you asked Mr. McKinzie?

A. No.

Q. Well, what did he say? Just give us his words as well as you can recall them.

(Testimony of Richard Valverde.)

A. I can't recall.

Q. Did you say something to him that you were worried about your job if you let them know if you were for the union?

Mr. Orloff: Objected to, if the Court please.

Trial Examiner Myers: Sustained.

Q. (By Mr. O'Brien): The thing that disturbs me, on cross examination he seemed to have a rather clear recollection, and now when I ask him direct questions he just doesn't seem to be there.

Trial Examiner Myers: Well, reframe it.

Mr. Orloff: He testified that he did not ask him any questions. There was no hesitancy or lack of memory on that. You asked him on direct if he had asked Mr. McKinzie a question and he said no.

Trial Examiner Myers: How did Mr. McKinzie happen to talk to you about that job elsewhere?

The Witness: With Mr. Marquez out there and most of the [154] time he talked to him first, and he talked to him all the time and I used to go with him.

Trial Examiner Myers: How did he happen to bring up the subject of employment elsewhere?

The Witness: I told him about if we would vote for the union would we get another job some place else, if the deal came through.

Trial Examiner Myers: What deal?

The Witness: The union.

Trial Examiner Myers: Try to put it in some simple language, will you please? What are you

(Testimony of Richard Valverde.)

talking about? I don't understand what you mean. Can you tell me?

The Witness: I am all confused now.

Mr. Orloff: May I attempt to clarify him on this answer?

Trial Examiner Myers: Fine.

Mr. Orloff: I think they told you they would give you a job if the union went in?

The Witness: If the deal came in or not, I would still have a job there.

Mr. Orloff: At that time you were still living at Placentia?

The Witness: Yes.

Mr. Orloff: Did they tell you they would give you a job closer to your home?

The Witness: No. [155]

Mr. Orloff: I thought that is what you were trying to tell us.

Trial Examiner Myers: Any further questions?

Mr. O'Brien: No questions.

Mr. Garrett: No questions.

Trial Examiner Myers: You are excused, sir. Thank you very much.

(Witness excused.)

Trial Examiner Myers: Mr. O'Brien, will you call your next witness?

Mr. O'Brien: Mr. Delgado.

Trial Examiner Myers: Will you step forward and be sworn?

DOMINGO DELGADO

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Domingo Delgado.

Trial Examiner Myers: Will you spell your entire name for the record?

The Witness: D-o-m-i-n-g-o D-e-l-g-a-d-o.

Trial Examiner Myers: Mr. Delgado, where do you live?

The Witness: 41519 Clarissa Street, Norwalk, California.

Trial Examiner Myers: Can you spell the name of the [156] street, please.

The Witness: C-l-a-r-i-s-s-a.

Trial Examiner Myers: You may be seated.

Mr. O'Brien, you may proceed with the examination of Mr. Delgado, who has been duly sworn.

Q. (By Mr. O'Brien): Where do you work, Mr. Delgado?

A. I work for Rehrig-Pacific Company.

Q. About how long have you worked there, sir?

A. About five years.

Q. Do you recall Mr. Rehrig making a speech before the election? A. Yes, I do, sir.

Q. How long before the election?

A. A day before the election.

Q. What time of the day?

A. About 3:15 in the afternoon.

(Testimony of Domingo Delgado.)

Q. What did Mr. Rehrig say?

A. Well, Mr. Rehrig called us all together that afternoon and he started a speech. He told us that it was a big day tomorrow and that he had no objections for us to join the union or not. He told us to think it over very carefully, because these things are very serious, and to be sure what we wanted was best for the boys.

He said that it was up to us to look into this matter very carefully, to go tomorrow and vote for the union or not; [157] that he had no objections to it.

Then he told us about some plan that he had about a bonus. He told us he was going to give us 25 per cent of the production we would make in a month. He said, "I am not trying to pull anything on you boys, just that it is a good thing to do." He said to try it for a little while, to see how it works.

He said, "You should not be afraid or hesitate to call on Mr. Kiser or Mr. Gildart to go and form some kind of a company."

Mr. Rehrig asked if there was any questions, and nobody said anything, and Mr. Howard took the works and asked Mr. Rehrig, "What about if the union wins?"

Mr. Rehrig replied, "If the union wins, you are on your own, boys."

Q. Is that all you remember about it?

A. He said something about wages, I don't remember exactly what it was. He said something about 10 per cent that the government was sup-

(Testimony of Domingo Delgado.)

posed to have been carried on, and he told us it was impossible for him to pay the 10 per cent on account of his production wasn't very high. Lumber was very high priced, and that he had to pay a lot of expenses on it, transportation and all of that, but he said that he was willing to try the bonus and give us a try on it to form a company of our own; to get a committee of four persons, that it was better for us to get together, instead of a union, because we was on our own. [158]

Q. Did you get the bonus?

A. Yes, we did.

Q. How long after the election?

A. I would say before the election.

Q. Are you still getting the bonus?

A. Yes.

Mr. O'Brien: That is all.

Trial Examiner Myers: Mr. Garrett, any questions?

Mr. Garrett: No questions.

Trial Examiner Myers: Mr. Orloff, any questions?

Cross Examination

Q. (By Mr. Orloff): Mr. Delgado, were you present at the plant each working day from February 1st to February 23rd? Did you miss any time in there?

A. To my knowledge, it is very hard to tell you, but more or less I was there present.

Q. You were present there every working day during that period? A. Yes.

(Testimony of Domingo Delgado.)

Q. Is that your best recollection?

A. Yes.

Mr. Orloff: No further questions.

Trial Examiner Myers: You are excused, sir. Thank you very much.

(Witness excused.)

Trial Examiner Myers: Mr. O'Brien, will you call your [159] next witness?

Mr. O'Brien: May I have just a brief recess?

Trial Examiner Myers: Suppose we recess now for lunch.

We will stand adjourned until 1:20 p.m.

(Whereupon, a recess was taken until 1:30 o'clock p.m.) [160]

After Recess

(Whereupon, the hearing was resumed, pursuant to the taking of the recess, at 1:30 o'clock p.m.)

Trial Examiner Myers: Mr. O'Brien, are you ready to proceed?

Mr. O'Brien: We are ready.

Trial Examiner Myers: Mr. Garrett, are you ready to proceed?

Mr. Garrett: We are ready.

Trial Examiner Myers: Mr. Orloff, are you ready to proceed?

Mr. Orloff: We are ready.

Trial Examiner Myers: Mr. O'Brien, will you kindly call your next witness?

Mr. O'Brien: Will the reporter kindly mark these documents for identification.

(Thereupon the documents above referred to were marked General Counsel's Exxhibits Nos. 17, 18 and 19 for identification.)

Mr. O'Brien: There has been furnished to me by Mr. Orloff, pursuant to subpoena, the following documents:

As General Counsel's Exhibit No. 17, a payroll list as of January 31, 1951.

As General Counsel's Exhibit No. 18, a payroll list as of February 7, 1951.

And as General Counsel's Exhibit No. 19, a payroll as of [161] February 28, 1951.

I am offering these documents in evidence with the following stipulation: That these payrolls indicate that the persons named thereon were employed sometime during the working week ending on each respective date, and that these names are those of employees within the bargaining unit described in the Complaint and admitted in the Answer to be appropriate for collective bargaining.

Trial Examiner Myers: Do you so stipulate?

Mr. Orloff: I guess I am going to have to. I provided him with the list. I so stipulate.

Trial Examiner Myers: Do you so stipulate, Mr. Garrett?

Mr. Garrett: So stipulate.

Trial Examiner Myers: And you, Mr. O'Brien, do you join in the stipulation?

Mr. O'Brien: Yes, of course. I am offering these documents in evidence.

Trial Examiner Myers: Are there any objections to the papers going into evidence?

Mr. Orloff: No objections.

Mr. Garrett: No objections.

Trial Examiner Myers: There being no objections, they will go into evidence, and I will ask the reporter to mark them as General Counsel's Exhibits Nos. 17, 18 and 19, respectively. [162]

(The documents heretofore marked General Counsel's Exhibits Nos. 17, 18 and 19 for identification were received in evidence.)

Mr. O'Brien: In General Counsel's Exhibit No. 5, there is a card signed "Rafael Barron Ruiz," which is compared to the name on the payroll list of Rafael DeVelasco. May we stipulate that that is the same person?

Mr. Orloff: So stipulate.

Mr. Garrett: So stipulate.

Trial Examiner Myers: And you, Mr. O'Brien?

Mr. O'Brien: I join in the stipulation.

Trial Examiner Myers: Could the parties stipulate that the person referred to as "Howard" is Howard Telke?

Mr. Orloff: So stipulate.

Mr. O'Brien: So stipulate.

Mr. Garrett: So stipulate.

Mr. O'Brien: In General Counsel's Exhibit No. 5, there is a card signed "Jesus Magana Padilla." On the payrolls the name "Magana Jesus" ap-

pears. May we stipulate that that is the same person.

Mr. Orloff: So stipulate.

Mr. Garrett: So stipulate.

Trial Examiner Myers: And you, Mr. O'Brien.

Mr. O'Brien: I join in the stipulation.

Trial Examiner Myers: Very well, gentlemen.

Mr. O'Brien: There is just one other matter in connection [163] with these exhibits. I have taken the liberty of comparing General Counsel's Exhibit No. 5 with Exhibits 17, 18 and 19, and the pencil marks to the left of each figure on the payroll sheets indicate that I found the name on General Counsel's Exhibit No. 5. That is my own mark and not a part of the exhibit.

There is a signature in General Counsel's Exhibit No. 5 for F. Ybarra. On the payroll list it is given as "Ibarra." I suggest the stipulation that that is the same person.

Mr. Orloff: So stipulate.

Mr. Garrett: So stipulate.

Trial Examiner Myers: And you, Mr. O'Brien?

Mr. O'Brien: So stipulate.

Trial Examiner Myers: Will you kindly call your next witness, Mr. O'Brien?

Mr. O'Brien: Mr. Magana.

Trial Examiner Myers: Will you step forward and be sworn?

RAUL MAGANA

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

(Testimony of Raul Magana.)

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Raul Magana.

Trial Examiner Myers: Kindly spell your entire name for the record. [164]

The Witness: R-a-u-l M-a-g-a-n-a.

Trial Examiner Myers: Where do you live, sir?

The Witness: 1119 East 14th Street, Los Angeles.

Trial Examiner Myers: You may be seated, sir.

Mr. O'Brien, you may proceed with the examination of this witness, who has been duly sworn.

Q. (By Mr. O'Brien): Where are you employed, sir? A. Rehrig-Pacific Company.

Q. For approximately how long?

A. About four years.

Q. Did you hear a speech by Mr. Bud Rehrig shortly before the Labor Board election?

A. Yes, I did.

Q. What do you recall that he said?

A. Well, I recall that he made an offer to us of a bonus.

Mr. Orloff: I object to that as calling for a conclusion of the witness:

Trial Examiner Myers: Strike it out.

Will you try to tell us what words you now remember that Mr. Rehrig said? We know that you can't recall all of his exact words, but tell us all you can remember.

The Witness: I don't remember very much. I remember he promised us a bonus.

(Testimony of Raul Magana.)

Trial Examiner Myers: Don't tell us what he promised.

The Witness: Some kind of a bonus of 25 per cent out of [165] what he made for a month, and then he was going to make a plan for some kind of a fund bank. I don't know what you call it. That we could try it and see if it was good, and if it wasn't good we could go to the union.

Q. (By Mr. O'Brien): Do you remember anything else that he said?

A. No, not very much.

Q. Did you get the bonus?

A. Yes, the first month.

Q. Are you still getting it?

A. Yes.

Q. Before the election did you see Mr. Gildart with a small book?

A. Yes.

Q. Did he speak to you on that occasion?

A. Yes.

Q. What did he say?

A. He asked me if I wanted the union or company, and I said the union. That is all.

Mr. O'Brien: That is all.

Trial Examiner Myers: Any questions, Mr. Garrett?

Mr. Garrett: No questions.

Trial Examiner Myers: Mr. Orloff, any questions?

Cross Examination

Q. (By Mr. Orloff): Mr. Magana, you didn't

(Testimony of Raul Magana.)

understand everything [166] that Mr. Rehrig said to you, did you?

A. Most of the conversation. Not exactly all, but part of it.

Q. Part of it you understood?

A. I don't understand English very well. I understand enough. A lot of words I don't get them, but I can understand a lot.

Q. Do you make yourself understood?

A. Yes.

Q. A lot of words you do understand, but some of them you don't understand?

A. Yes; but the rest of them that I know, that is the way I understand it.

Q. In other words, after you talk it over it helps you to understand it?

A. No, I get it when he talked to all of us.

Trial Examiner Myers: Do you speak Spanish?

The Witness: Yes.

Trial Examiner Myers: Is that what you mean?

The Witness: I came from Mexico in 1946.

Trial Examiner Myers: What you mean is you understand Spanish much better than English?

The Witness: Yes.

Q. (By Mr. Orloff): By the way, did Mr. Rehrig speak in Spanish that day?

A. He talked a little bit. I don't think he talked very much. He just talked for fun. [167]

Q. That day he made the speech did he talk to you in English or in Spanish?

(Testimony of Raul Magana.)

A. He talked in English and then afterwards he said a few words in Spanish, just for fun.

Q. Did he say anything about the bonus in Spanish?

A. No.

Mr. Orloff: That is all.

Trial Examiner Myers: Any redirect, Mr. O'Brien?

Mr. O'Brien: No.

Trial Examiner Myers: Any questions, Mr. Garrett?

Mr. Garrett: Yes.

Redirect Examination

Q. (By Mr. Garrett): When Mr. Rehrig talked to you, when he made the speech, Mr. Magana, was Mr. Gildart there, too?

A. I don't remember exactly, but I think he was there.

Q. Do you remember someone who was there who translated what Mr. Rehrig said for those who didn't speak English?

A. No, I don't remember.

Q. Do you remember any translation going on?

A. No.

Q. Do you know Mr. Gildart?

A. Yes, I do.

Mr. Garrett: No further questions.

Trial Examiner Myers: Mr. Orloff?

Mr. Orloff: No further questions. [168]

Trial Examiner Myers: You are excused, sir. Thank you very much.

(Witness excused.)

Trial Examiner Myers: Mr. O'Brien, will you kindly call your next witness.

Mr. O'Brien: The General Counsel rests.

Trial Examiner Myers: Mr. Garrett, do you have any witnesses?

Mr. Garrett: No.

Trial Examiner Myers: Mr. Orloff, when will you be ready to proceed with your case?

Mr. Orloff: I brought a couple of witnesses for this afternoon anticipating that the General Counsel might be finished.

Trial Examiner Myers: Do you want to proceed now?

Mr. Orloff: Yes.

Trial Examiner Myers: Will you call your first witness, please?

Mr. Orloff: Mr. Gildart.

Trial Examiner Myers: Will you raise your right hand and be sworn, please? [169]

RICHARD GILDART

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Richard Gildart.

(Testimony of Richard Gildart.)

Trial Examiner Myers: Kindly spell your last name for the record.

The Witness: G-i-l-d-a-r-t.

Trial Examiner Myers: Where do you live?

The Witness: 5589 Watcher Street, Bell Gardens, California.

Trial Examiner Myers: Mr. Orloff, you may proceed with the examination of Mr. Gildart, who has been duly sworn.

Q. (By Mr. Orloff): What is your occupation?

A. I am superintendent of the plant.

Q. What plant?

A. Rehrig-Pacific Company.

Q. How long have you been so engaged?

A. Approximately between 14 and 15 years, with absence during war service.

Q. How long have you been superintendent?

A. Approximately three years, to my recollection.

Q. Now, do you know Edward Baca?

A. Yes, I do. [170]

Q. Did you have conversation with him relative to union activities at the plant?

A. Yes, I did.

Q. Did you have more than one conversation?

A. I believe there was two that I can remember.

Q. Now, calling your attention to the first of these conversations, can you tell us approximately when that was?

A. On or about the 30th, I think, of January or February.

(Testimony of Richard Gildart.)

Q. There is no 30th in February.

A. I mean it was January.

Q. About the 30th of January? A. Yes.

Q. Can you fix that date specifically?

A. No, it is just approximately.

Q. Towards the end of January?

A. Yes.

Q. Where did the conversation take place?

A. It took place in my office. It is in the plant.

Q. In the plant? A. Yes.

Q. Describe it so we can get some idea where the office is with respect to the rest of the plant.

A. The office is situated about the middle of the plant and about the center of all activity. It is a plyboard throw-up with glass windows. [171]

Q. Was anyone else present at the time of this conversation?

A. Yes, I believe Edward Hinajosa was there.

Q. Do you know if he was there during all of the conversation?

A. No, I don't believe so. I believe he left.

Q. Was anyone else there? A. No.

Q. Do you recall what time of the day it was?

A. Not exactly, it was in the morning.

Q. Will you relate what the conversation was?

A. The conversation was I asked this fellow Hinajosa that I wanted to speak to Baca, which he did, and he came in and at the time I asked him for any reason that he was doing all of this activity with the union for any reason against myself or any relationship through previous employ-

(Testimony of Richard Gildart.)

ment that we had together when he first came to me. He came to me through my cousin. My cousin asked me to give him a job when he was out of a job, and I told him to bring him down, which he did roughly a year ago. He worked there for two or three months and then he got his job back and he left.

I asked him if he ever needed any help he could come back and I would be glad to help him out if he lost his job again, after which he showed up——

Trial Examiner Myers: Confine yourself to the question. What was said?

The Witness: That is what was said. [172]

Trial Examiner Myers: You didn't go back and tell him that about your cousin?

The Witness: No.

Trial Examiner Myers: Just tell us what was the conversation at the conference or meeting that you had with him near the end of January.

The Witness: In regard to that I asked him if for any reason he had anything against me. I said to him that I had worked a great many years, roughly about three years, gearing up the factory into what it is today. I picked it up from not too good of a situation and put it where it is today. And I was wondering if for any reason he had anything personally against me through any relation of mine.

That is all I wanted him for, was to find out if he had something against me; if that is why he was

(Testimony of Richard Gildart.)

in this activity. That was more or less what the conversation was about.

Q. (By Mr. Orloff): What did he say in reply to that?

A. Yes, he replied that he had nothing against me, that it was nothing against me for any personal reason, but more or less for a better deal or more money.

Q. Was that the end of that conversation?

A. That is all.

Q. Then you had another conversation with him? A. Yes.

Q. At some later time? [173]

A. Yes, about a week or so later.

Q. Where did that conversation take place?

A. Near the end of the building, I guess near the machine shop.

Q. Now, digressing for a moment, in the interim between this first conversation that you had with Baca and the second one, of which you have not told us yet, did you have occasion to go through the plant in connection with union activity?

A. Go through the plant?

Q. Yes. There has been some testimony you went through the plant with a book and you asked —you may have heard Mr. Magana testify that you asked him if he was for the union.

A. Yes, I remember.

Q. Did you go through the plant with a book and ask the employees whether they were for the union? A. Yes, I did.

(Testimony of Richard Gildart.)

Q. Approximately when was that?

A. It was shortly after lunch.

Q. What day, if you remember?

A. It was on a Monday, approximately a Monday, maybe after——

Q. If I showed you a calender, do you think you might be able to pick out a date pretty close?

A. Yes, I think so. It was on or about the 29th, I guess.

Trial Examiner Myers: Of what?

The Witness: January. [174]

Trial Examiner Myers: Was it after you first talked with Mr. Baca or before?

The Witness: I believe it was before. It might have been after, it is pretty hard to remember.

Q. (By Mr. Orloff): You don't remember whether it was a Monday before or after your talk with Baca?

A. No, I don't remember. It might have been more or less after. It is pretty hard for me to remember.

Q. Was it the Monday following youd talk with Baca? A. I would say that.

Q. Your best recollection is that it was the Monday following. That, according to the calendar, was February 5th.

A. That doesn't strike me as being right.

Q. You said you talked to him around the 30th, and the Monday following that would be February 5th.

A. To my recollection, I would say that.

(Testimony of Richard Gildart.)

Q. Sometime about February 5th you went through the plant and asked numerous, some, or all of the employees whether they wanted the union or didn't want it? A. That is right.

Trial Examiner Myers: Did you ask some, numerous, or all?

The Witness: I started in asking all, but when I had a survey of what might be a majority, I didn't ask any more.

Trial Examiner Myers: About how many people did you ask?

The Witness: About 35 or so. [175]

Trial Examiner Myers: At that time you had about 60 employees?

The Witness: Yes.

Trial Examiner Myers: There were 35, and that looked like a majority?

Q. (By Mr. Orloff): In other words, when you got 35 on one side, you stopped?

A. Yes, I just stopped and didn't ask any more.

Q. Now, in your survey did you ascertain—you told us you got approximately 35 on one side. On what side of the fence was that figure, in favor of or opposed to? A. Opposed to the union.

Q. How did you happened to make the survey?

A. I went around to each person.

Q. Not how, but why did you make the survey?

A. Previous to all of this union activity, I had somewhat of a plan of my own which I worked pretty hard on. During the course of that time I had no knowledge of the union activity. And being

(Testimony of Richard Gildart.)

ready to launch this program myself, with the union activity in stepping in sort of ruined what I was making for the plant and building something for these men to benefit by. I thought maybe if there was a chance, that some of the men would still oppose the union.

Q. Prior to the time of your making the survey, had you had a talk with Mr. Kiser about making it? [176]

A. Yes, I talked to Mr. Kiser before he took sick.

Q. About making a survey in the plant?

A. No.

Q. Try to listen to my questions, please.

A. All right.

Q. Had you talked to him about making a survey in the plant? A. Yes.

Q. When did you talk to Mr. Kiser about such a survey?

A. That is when Alfred Maldonado had talked already to Mr. Kiser with regard to some of the men wanting to oppose the union, of which I didn't know anything about.

Q. How long before the conversation was the survey made?

A. On the same day, shortly after noon.

Q. On the same day shortly after noon?

A. That is when I made the survey.

Q. You made the survey in the afternoon? When did you talk to Mr. Kiser?

A. Sometime during that morning or after-

(Testimony of Richard Gildart.)

noon. It was when I found out—I can't place the time—it was when I found out that Alfred Maldonado had determined some opposition.

Q. Then you were told Maldonado had some opposition to the union, and on that day you made a survey?

A. Yes. I talked to Mr. Kiser, I can't remember the exact time. When I heard about that there was an opposition—Maldonado thought he had opposition or a majority, and I said, [177] "I will soon find out." I went out to make the survey, which was shortly after noon.

Q. Now, after you made this survey, did you report what it showed to Mr. Kiser?

A. Yes, I did.

Q. Then sometime after the survey, tell me approximately when—you had a talk, a further talk with Baca, is that right?

A. Yes, a week or so later.

Q. When?

A. A week or so later, maybe three or four days.

Q. Do you think you can fix the date with the calendar? If you think you can, we would like to have a date.

A. Dates are pretty hard to place.

Q. Approximately a week later?

A. Yes.

Q. Anyway, it was afterwards. That conversation, I believe you told us, took place near the machine room? A. That is right.

(Testimony of Richard Gildart.)

Q. Do you remember who was present at that conversation?

A. It was myself, Baca, Mr. Telke, and I believe another fellow. I don't know, it might have been Hinojosa, I don't remember.

Q. Could it have been a fellow by the name of Coffey? A. Yes, he was there.

Q. Will you relate the conversation that took place with Baca [178] at that time?

A. At that time I explained to them about why they wanted the union; that I had a plan that I thought would benefit better the men in the plant, that we could probably work out something maybe as good or better than the union, and at the same time we would be in our own organization. We would not have to deal or have anything to do with anybody else, and we could determine our own activity.

Q. What did Baca say, if anything?

A. Baca didn't say much. "Well," he said, "I am not sure. Everybody is changing their mind." He said, "I am going to fade out," or something to that effect.

Q. That was the gist of the conversation?

A. That is just about it.

Q. During the month of February, around the 7th or 8th, there were approximately seven employees who were discharged. Do you recall that incident? A. Yes.

Q. With reference to that, can you tell me whether or not there was any employee represen-

(Testimony of Richard Gildart.)

tation that this matter of discharge was discussed with?

A. Yes, more or less the same group that were in the conversation by the machine shop, plus a few others.

Q. How did it happen to be that particular group?

A. Under the survey and the fact that we might have a chance, [179] the fellows got together and they elected certain representatives from their own departments to represent them in this meeting. From the metal shop there was Alfred Maldonado and Frank Marquez. In the wood department there was Coffey and in the line there was Carlos Taylor, Mr. Telke and myself.

Q. Was Mr. Baca there?

A. He was there, yes.

Q. Can you think of anyone else, if there was anyone else?

A. I don't think there was anybody else.

Q. That took place when? A day or two after the survey? A. That is right.

Q. At that time what was discussed?

A. I discussed these men I was going to lay off. We had a terrific amount of surplus men that I couldn't do anything with. I didn't want to interfere with union activity. I wanted nothing to do with the fact that I might be doing something wrong, and I called these men and we explained the layoff of the seven men. They were the last ones in, so naturally they would be the first ones out,

(Testimony of Richard Gildart.)

inasmuch that is how many we were going to lay off.

Q. Then, was there a meeting of the personnel afterwards at any time, whether that day or the next day?

A. Yes, I believe we had another meeting where we discussed different things we could do.

Q. Was there a meeting of the entire employee group after [180] the meeting of this smaller group the same day, the next day or the next week. Was there a meeting afterwards?

A. There was a meeting, I don't recall exactly when, at which time I believe I told the men of these men being laid off for that particular reason and for no other.

Q. Now, were you in the plant on the day before the election was held there?

A. I believe I was.

Q. Did you hear a speech made by Mr. Rehrig?

A. Yes, I did.

Q. Do you know whether or not anyone asked Mr. Rehrig to make the speech?

Mr. Garrett: Can that question be answered yes or no?

Mr. Orloff: Yes, it can be answered yes or no.

The Witness: Yes.

Q. (By Mr. Orloff): Who asked him?

A. Mr. Telke.

Q. Did he ask him directly or did he come to you, or how was it done?

(Testimony of Richard Gildart.)

Mr. Garrett: There is no foundation yet to show the basis of this witness' knowledge.

Mr. Orloff: That is what I am trying to find out.

Q. (By Mr. Orloff): In other words, did Mr. Telke ask Mr. Rehrig in your presence?

Trial Examiner Myers: It doesn't make any difference who [181] asked him, it is what he said.

Mr. Garrett: And where he said it and who he was talking to.

Mr. Orloff: There is an inference that this was a meeting called by Mr. Rehrig to address the men.

Trial Examiner Myers: Is that Howard Telke?

The Witness: Yes.

Trial Examiner Myers: Did he come to you and ask Mr. Rehrig to make a speech?

The Witness: He probably mentioned it to me.

Trial Examiner Myers: How do you know that Telke asked Mr. Rehrig?

The Witness: He mentioned it to me.

Trial Examiner Myers: Did you go to see Mr. Rehrig?

The Witness: No, I don't believe I was there.

Trial Examiner Myers: All right, go ahead.

Q. (By Mr. Orloff): Did Mr. Rehrig make a speech to the men on the day before the election?

A. Yes.

Q. Will you relate as best you can recall just what he said?

A. Well, he spoke to the men about that he knew there was union activity and that they could

(Testimony of Richard Gildart.)

join the union or didn't have to join the union. He didn't much care what they done, it was more or less up to them.

Q. Do you recall anything further? Do you recall whether he [182] was asked the question or whether there was any reference made to a bonus in that speech?

A. I don't recall whether it was in a speech or not.

Q. But there was some reference made to a bonus in some speech?

A. Yes.

Q. It may have been that one?

A. It may have.

Q. Can you recall what was said in that connection?

A. He said under that plan which the employees could organize they could share 25 per cent of the company's profits.

Q. Was he asked that if the union came in would they be permitted to participate in this profit-sharing plan? Did anybody ask him that question? A. Yes.

Q. Who? A. Howard Telke, I believe.

Q. What did he say in reply to that, if anything?

A. As near as I can remember, he shrugged his shoulders and half smiled and said it would be up to the men, or something to that effect. More or less, "It is up to you fellows," was the terms he used.

(Testimony of Richard Gildart.)

Q. Did you on that occasion translate his speech to the group in Spanish?

A. Not me, no, sir. [183]

Q. Did you hear anyone else translate it?

A. No, sir.

Q. Where were the employees at the time that the speech was made?

A. At that particular speech I believe they were in the vicinity of the plant, just gathered around.

Q. Just gathered around in the plant?

A. Yes.

Q. All gathered closely together?

A. No, they were spread all out.

Q. Some were near to him and some were further away? A. That is right.

Q. Was there a loudspeaker used?

A. No.

Q. Is there a loudspeaker system in the plant?

A. No, sir.

Mr. Orloff: No further questions.

Trial Examiner Myers: Mr. O'Brien, have you any questions to ask this witness?

Cross Examination

Q. (By Mr. O'Brien): Mr. Gildart, with reference to your conversation with Mr. Baca on the 30th of January, the calendar shows that as a Tuesday. Is that your recollection?

A. I believe so.

Q. It could have been Tuesday? [184]

A. Yes.

(Testimony of Richard Gildart.)

Q. Did you ask him to come to your office?

A. Not directly, no.

Q. You sent word through a fellow employee that you wanted to see him?

A. That is right.

Q. Why did you want to see him?

A. Do you want me to repeat that?

Q. What caused you to call him into the office at that time?

A. I had a particular reason for calling him, which was personal.

Q. Then after that personal matter was taken care of, you went into the discussion that you have told us about? A. That is right.

Q. How did you know that he was interested in the union?

A. From his participation, from what I could gather, and from what I could see; also from what I could hear.

Q. Had you actually seen him talking to the employees about a union?

A. In a half-hidden sort of way. I can determine by sense when a man is doing something.

Q. Did you hear any of the conversation?

A. No, I never cared to be near when he was conferring with them.

Q. Had any employees come to you? [185]

A. Just hearsay. I wouldn't take a hearsay statement from anybody.

Q. You just kind of sensed that he was back of the union activity? A. That is right.

(Testimony of Richard Gildart.)

Q. You don't recall anyone specifically telling you about Mr. Baca being interested in the union?

A. When something starts in you get a lot of rumors and you can't believe what you hear. I just form my own opinion and let it go at that.

Q. That is a small plant and a rumor goes through it faster than you can yell.

A. Oh, sure.

Q. It wouldn't make any difference whether it was in English or Spanish; there are enough bilingual people there?

A. That is right. I can understand both.

Q. You said something about having a plan of your own and discussed that with Mr. Baca on this first occasion in your office?

A. I think so, and I think I discussed it with him at some other time, but I don't remember exactly when. I discussed it with quite a few people who came to ask me about it, and who they were it would be hard to tell, because I talked to a lot of them.

Trial Examiner Myers: When? [186]

The Witness: It scatters a long way along. This plan I have been working on for a good many years. I didn't launch it to Mr. Kiser until shortly before the union stepped in, which was a great disappointment to me.

Trial Examiner Myers: Did you speak to any employees about it before the union came in?

The Witness: Oh, yes, we talked about it.

Trial Examiner Myers: Who?

(Testimony of Richard Gildart.)

The Witness: Me and Maldonado and some of the boys that had been there quite a while. I can't talk to everybody. While I was building it up I could talk to some of the boys who were serious. I wanted them to know what I was going to do. It wouldn't do me any good to talk to the plant, as they could take it as a rumor or take it any way they wanted to.

Q. (By Mr. O'Brien): That is, when you spoke to one of the employees you knew they would pass on it?

A. Either they passed on it, or just called it plain baloney, one or the other. I have some men who won't regard something like that serious. Therefore, I know better than speak about something that wouldn't be taken. I wouldn't want to tell them it is going to happen tomorrow, when it isn't.

Q. Do you know when you first spoke to Maldonado about it?

A. It must have been at least a month before any union activity there. Some of the other fellows and Mr. Kiser and I discussed it, and I presented it to Mr. Kiser before he took [187] sick. I told him what I had in mind, which was a little premature then, and I wasn't ready to start to explode the thing, as we still had a few things to straighten out.

Q. Had you formulated your ideas in writing?

A. No, it was premature and just ready to set

(Testimony of Richard Gildart.)

down and ready to get going. That is why my disappointment was greatest of all.

Q. When was the plan reduced to writing?

A. Not much of it had been reduced to writing when the union stepped in. The boys weren't working with their full hearts and the fact that the thing was in the process of going through—things haven't been the same ever since then. It just absolutely took the confidence out of everybody.

Even at that, I think we have kept it together.

Q. What was this plan?

A. I had a plan of making the plant into a production capacity that had never been known before. Before, I worked under the former superintendent. I was only an employee under him, and it was not until three years ago that I could start in and work this out.

The plant was absolutely down when I came out of the Service and there wasn't a machine running.

I put everything into running shape myself and worked under this fellow, and when he was found out to be of no use, I took over his place and I put in machinery and spent money [188] enough to put it into shape.

I urged Mr. Rehrig and Mr. Kiser and all of them with the possibility it would be something in which the employees could share in the plant. I worked for three solid years and the final thing——

Q. My question was what was the plan?

A. The plan was to get down to the employees and plan an organization of our own where we

(Testimony of Richard Gildart.)

could ask for days of the year with pay, start a hospital plan and have something that we could all benefit by and have our own, instead of dealing with anybody else. That was the important thing of it all.

Trial Examiner Myers: What do you mean, your own?

The Witness: Our own hospital plan under an organization where we could go in as a group.

Trial Examiner Myers: Your own organization?

The Witness: In other words, our own bargaining organization among the employees. I am pretty sure that some of the company boys will tell you that I am not a company man; otherwise I would not have worked as hard as I did. I went too far out of my way to help them, personally, rather than even go to the company.

As far as the bargaining of the employees with the company, they do it all themselves.

Q. (By Mr. O'Brien): That is the plan that you say you were about ready to launch when this union activity started? [189]

A. That is right, sir.

Trial Examiner Myers: Was that plan ever put into existence?

The Witness: No; since the union stepped in we went ahead with part of it and we couldn't get the final ends together since that activity showed up.

Trial Examiner Myers: What part did you put into effect?

(Testimony of Richard Gildart.)

The Witness: The bonus, which was part of it, the 25 per cent, and along with any other things that the men would want to put up with their group to the company.

Q. (By Mr. O'Brien): With reference to that bonus, when was it first mentioned to the employees?

A. Well, it was probably mentioned to the employees, offhand, maybe by me sometime or other. But, officially, I don't think it was mentioned until Mr. Rehrig mentioned it, outside of the fact that a lot of these boys—the thing that threw the bonus plan out of the picture is this fellow that I told you about that was working with the company. He started a plan, it was somewhat of the same name, and it had the word "bonus" in it. It didn't work out. Some of these men remembered that, and it was pretty hard for me to put something through like that with that in effect, because this had nothing to do with that at all.

Q. When they think of bonus, they think of speed-up?

A. No, they thought it was cooked up. I wanted the men to [190] have something worthwhile and satisfy some of the forethoughts of what happened before, a couple or three or four years ago, which would interfere with a fellow believing in it sincerely enough to maybe believe me if I told him.

Q. Your mention of bonus was just in individual conversations and you were feeling out the employees?

(Testimony of Richard Gildart.)

A. Those that I mentioned it to I knew were sincere enough to believe it.

Q. That was in connection with your other plan for the organization of your own?

A. That is right.

Q. Then you say the first official notice was in a speech by Mr. Rehrig?

A. That is right.

Q. You don't remember whether that was on a date before the election or some other time?

A. I wouldn't be able to say.

Q. After those seven or eight discharges, did you call a group of employees together? I think you said you had a meeting with some smaller group of employees where the discharges were discussed.

A. Yes, I believe we had a meeting where I discussed those. I believe it was the meeting where I translated it into Spanish to a group that I wanted to understand it.

Q. And this group comprised, you say, the repsentatives of [191] different sections of the plant?

A. Well, no, the one meeting was that. The one meeting before was the one which represented the men, where we discussed the seven men. That was the meeting of the representatives of each group, yes.

Q. And how were these representatives selected, do you know?

A. The men voted them in according to depart-

(Testimony of Richard Gildart.)

ments. They voted for their own men that they wished to represent them.

Q. And you were notified of these results?

A. Yes.

Q. When were these representatives elected?

A. The time or the date?

Q. Approximately what time of year and the date?

A. I am afraid the date is going to be off.

Q. We have the date fairly well fixed.

Trial Examiner Myers: Can you fix the month? Was it before the election?

The Witness: Yes.

Trial Examiner Myers: Away before the election?

The Witness: Yes.

Trial Examiner Myers: About how long before?

The Witness: I can't say for sure.

Trial Examiner Myers: Was it sometime this year?

The Witness: Yes.

Trial Examiner Myers: We have in evidence here the payroll [192] records of January 31st.

The Witness: It was sometime the first part of January, you might say.

Trial Examiner Myers: We have in evidence here the payroll records of January 31st, February 7th and February 18. Will you look at those and see if the names appear on the payroll records? Perhaps that will fix the date. [193]

(Testimony of Richard Gildart.)

Look at the last page of General Counsel's Exhibit No. 16. Are those the seven men?

The Witness: Yes.

Trial Examiner Myers: Those men were on the payroll of February 14, 1951, but were discharged sometime between February 14th and the date of the election, which was February 23rd.

The Witness: Well, it was before that.

Trial Examiner Myers: Before what?

The Witness: Before February 14. It was right after the boys were discharged.

Trial Examiner Myers: That you had this meeting?

The Witness: I am all bawled up now.

Trial Examiner Myers: Do you want a few minutes to think it over?

The Witness: Yes, that is right.

Trial Examiner Myers: Examine the papers and think about it.

We will take a short recess.

(Short recess.)

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. O'Brien: We are ready.

Mr. Orloff: We are ready.

Mr. Barrett: Yes, we are ready.

Trial Examiner Myers: After examining these papers, can [194] you tell us the date of the meeting?

The Witness: On or about the 7th.

Trial Examiner Myers: Of what?

(Testimony of Richard Gildart.)

The Witness: February.

Trial Examiner Myers: This year?

The Witness: That is right.

Q. (By Mr. O'Brien): It was about February 7, 1951, that you called these representatives together? A. That is right.

Q. And it was the only purpose of that to explain these layoffs or discharges?

A. Discuss the people being laid off.

Q. The three or four years you have been superintendent you have had numerous occasions to lay off or discharge employees?

A. That is right.

Q. Had you ever consulted before with employee representatives?

A. There was no group of any large amount other than a particular layoff or a quantity of men for a particular reason.

Q. My other question was, when were these representatives elected, if you know?

A. When?

Q. Yes.

A. They were elected sometime prior to that meeting. Might have been the later part of January or the first part of [195] February. Close to the time of the meeting, as I recall.

Q. Did you know about the elections before they were held?

A. Well, the discussion among them was that they were going to have them, yes. At the time they were having them I knew it, yes.

(Testimony of Richard Gildart.)

Q. Do you recall how many speeches Mr. Rehrig made to the employees?

A. I believe there were three that I can remember.

Q. You have described the one just before the election. When were the others, if you recall?

A. There was one sometime after the election, and then there was one prior to the election, or prior to the one before the election, as I recall.

Q. Now, the first speech, was that made before or after you went through the plant with this list of names? A. That was after.

Q. It was after that? A. Yes.

Q. And had you reported the results of your survey to Mr. Rehrig? A. No, to Mr. Kiser.

Q. Do you remember what Mr. Rehrig said in his first speech?

A. His first speech had something to do with the knowledge of the union activities in the matter of which the employees wanted to choose their way. Whichever way they went was all [196] right with him.

Q. Did he mention the bonus at this first speech?

A. No, I don't think so. In fact, I don't know.

Q. So far as you know, the first official notice of the bonus was the day before the election?

A. Yes.

Mr. O'Brien: That is all.

Trial Examiner Myers: Mr. Garrett, have you any questions to ask this witness?

(Testimony of Richard Gildart.)

Mr. Garrett: Yes, I have some questions, your Honor.

Q. (By Mr. Garrett): I think you said, Mr. Gildart, that that second talk you had with Mr. Baca before the election was outside the machine shop, is that correct? A. Yes.

Q. That is the one that Mr. Coffey was present at? A. Yes.

Q. And Mr. Hinojosa?

A. He might have been there. I am not sure about him.

Q. That machine shop would be one of the departments of the plant?

A. You might call it a department, inasmuch as it differs from the rest.

Q. There is a difference in the work?

A. That is right.

Q. Then there is the production line? [197]

A. That is right.

Q. You figured that as another department, did you? A. That is right.

Q. Then there is a shipping and trucking department; do you figure that as a separate department?

A. No, we work that out among ourselves.

Q. So the distinct departments are the machine shop and the production line. Did you consider any others?

A. Yes, the metal shop, which includes the wire, as it is all in the same line.

Q. We have three now, the machine shop, the

(Testimony of Richard Gildart.)

production line and the metal shop. Are there any others? A. The wood department.

Q. In there there is woodworking machinery, I take it? A. That is right.

Q. Now, is the machine shop in a segregated and distinct portion of the building?

A. Yes.

Q. The activities of the company are all under one roof? A. That is right.

Q. The machine shop is in a particular portion of that space under the roof, is that right?

A. That is right.

Q. Then when you come out of the machine shop—there are entrances in the front and rear of the large building that [198] houses the plant?

A. Yes.

Q. Those entrances are approximately in the center, are they not?

A. To the side of the entire building.

Q. The building is a building that is on an east-and-west street and it is on the south side of the street fronting north, is that right?

A. That is right.

Q. So that the machine shop, would that be to the west of the center of the building or to the east? A. To the west.

Q. And as you emerge from the machine shop you come into a passageway that runs the length of the building? You come into a passage, the one that goes from the entrance in the front to the entrance in the rear, is that correct?

(Testimony of Richard Gildart.)

A. That is correct.

Q. That is open for the passage of the employees who have to go from one department to another, is that right? A. That is right.

Q. That is their way of getting from one department to another, right? A. Right.

Q. As you come out into the hallway from the machine shop there is a bulletin board there, right?

A. That is right.

Q. And that has been in use for some years, has it not, at that point?

A. Well, yes, that is right.

Q. You have been using it for the past few years to put messages of general interest to the employees, is that right? A. Yes.

Q. It is a blackboard arrangement, is it?

A. That is right.

Q. It is about three feet by four feet, is it not?

A. That is right.

Q. And important messages that are to come to the attention of all the employees you either write or post them there at the blackboard, is that right? A. That is right.

Q. You spoke of Mr. Kiser's illness. I suppose that necessitated Mr. Kiser being away from the plant? A. That is right.

Q. And you spoke of saying something to Mr. Kiser about your ideas concerning this company organization? A. That is right.

Q. And I think you stated that you had also talked to Mr. Maldonado or Mr. Magana?

(Testimony of Richard Gildart.)

A. Mr. Maldonado.

Q. You first talked to Mr. Maldonado about this plan and then [200] later to Mr. Kiser, is that correct?

Mr. Orloff: That is not the testimony.

Mr. Garrett: The way I have it in my notes is that he talked to Mr. Maldonado about one month before the start of the union activity, and to Kiser about three weeks——

Mr. Orloff: He also talked to Mr. Kiser prior to his illness in December of the preceding year.

Trial Examiner Myers: He didn't say when his illness was.

Q. (By Trial Examiner Myers): When did you first talk to Mr. Maldonado?

A. The exact date?

Q. Was it this year?

A. It was this year and possibly the latter part of last year. We discussed it frequently.

Q. Sometime from the latter part of December up to when? Was it before the latter part of January? A. Up to the present time.

Q. Are you still talking to him about it?

A. Sure.

Q. About forming this company union?

A. Absolutely.

Q. When did you first speak to Mr. Kiser about forming the company union?

A. I spoke to him sometime in December, shortly before he [201] took ill. We didn't have too much to talk about because he left shortly after

(Testimony of Richard Gildart.)

that on a leg illness, of which he was laid up for two weeks.

Q. Then the first time you spoke to Mr. Kiser was in December, 1950? A. That is right.

Q. By the way, what is your job at the company?

A. I am called the superintendent. I look over the entire plant and its activity.

Q. Who is your immediate superior?

A. I have only leadmen.

Q. I mean above you.

A. Mr. Kiser and Mr. Rehrig.

Q. Your immediate supervisor is Mr. Kiser?

A. That is right.

Q. Mr. Kiser is lower down in the managerial bracket than Mr. Rehrig?

A. Yes.

Q. What is Mr. Rehrig's first name?

A. They call him Buddy.

Q. What is his connection with the company?

A. As far as I know, he is the owner.

Q. Do you know a Muriel Rehrig?

A. I am not very well acquainted with the family. I believe it is one of his sisters. [202]

Trial Examiner Myers: The complaint says Muriel Rehrig doing business as Rehrig-Pacific Company.

Mr. Orloff: We have admitted that by our failure to deny it.

Trial Examiner Myers: Then what is Mr. Rehrig's position with the company?

(Testimony of Richard Gildart.)

Mr. Orloff: As far as I know he is the general manager.

Trial Examiner Myers: I just wanted to clear that up.

Mr. Orloff: As long as we are going into the record and so your Honor will have it, Mrs. Rehrig, as I understand it, is the mother of Houston Rehrig.

Trial Examiner Myers: Is that H-o-u-s-t-o-n?

Mr. Orloff: Yes.

Trial Examiner Myers: All right, Mr. Garrett, you may proceed.

Q. (By Mr. Garrett): Now, you had your first conversation with Mr. Baca about the union, you testified on January 30th. Do you remember fixing that date? A. That is right.

Q. Do you remember looking at the calendar?

A. No, sir, I don't.

Trial Examiner Myers: He said about January 30th. He did not look at the calendar at that time.

Q. (By Mr. Garrett): How long before that was it that Mr. Kiser came back to work after his illness? [203]

A. It was about—I know he was out and he came in shortly before New Year's and he came back about a week later, which would put that on about the—he came back about, I would say the 4th maybe.

Q. Of what month?

A. The 4th of February.

(Testimony of Richard Gildart.)

Trial Examiner Myers: Right after New Year's?

The Witness: It would be January, maybe the 7th. It was the week after New Year's.

Q. (By Mr. Garrett): He was sick in December, he came back briefly around New Year's and he came back to work steady around the first week in January?

A. I wouldn't say steady. I think he came in for part of the day.

Trial Examiner Myers: Mr. Orloff, could you ascertain for the record when Mr. Kiser was ill and when he returned to work.

Mr. Kiser: I became ill in mid-December and I came back for a couple of hours a day around about the 29th of December and kept that schedule up until about the 25th or 26th. It was the last week in January before I came back steady. I would come down and check things over and go back.

Mr. O'Brien: If you want a stipulation to that effect, I will so stipulate.

Trial Examiner Myers: Do you so stipulate, Mr. Orloff? [204]

Mr. Orloff: I will join in the stipulation.

Trial Examiner Myers: And you, Mr. Garrett?

Mr. Garrett: Sure.

Trial Examiner Myers: How long was Mr. Kiser back to work before the letter of January 31st was sent by the union to the company?

Mr. Orloff: How long were you back before

(Testimony of Richard Gildart.)

the letter from the union was received at the Rehrig-Pacific Company?

Mr. Kiser: I would say I was back in the week of January 22nd on a pretty full-time basis.

Trial Examiner Myers: Do you accept that as a stipulation, Mr. O'Brien?

Mr. O'Brien: So stipulate.

Mr. Orloff: So stipulate.

Mr. Garrett: So stipulate.

I want to find the letter that we have just been referring to.

Mr. O'Brien: That is General Counsel's Exhibit 3.

Q. (By Mr. Garrett): This is the letter of January 31st, 1951, which is in evidence here as General Counsel's Exhibit No. 3. This is only a copy of the letter that was sent by the union.

Do you recall Mr. Kiser being back to work when that letter came in?

Mr. Orloff: I object to that. He would have no way of [205] knowing when the letter was delivered or when it would come in.

Trial Examiner Myers: I will sustain the objection.

Have you got the date fixed when Mr. Kiser returned to work.

Mr. Orloff: I thought we fixed that by stipulation.

Mr. Garrett: It was the last week in January.

Mr. Orloff: The week of January 22nd.

Q. (By Mr. Garrett): Read the letter over. Do

(Testimony of Richard Gildart.)

you recall that letter being brought to your attention, Mr. Gildart? A. I don't remember.

Q. Do you recall discussing it with Mr. Kiser?

A. Yes.

Q. Was that on or about the date it bears, on or about January 31, 1951?

A. It would be very hard to tell.

Mr. Orloff: I can't hear you.

The Witness: It would be very hard to tell.

Q. (By Mr. Garrett): Do you recall discussing it about the time you had your first conversation with Baca about the union which you have heretofore set as having taken place January 30th?

A. I don't think so.

Mr. Orloff: What was the answer?

(The answer was read.)

The Witness: Letters that come to the company, I wouldn't see them for maybe a week, unless they are brought to me. [206]

Trial Examiner Myers: He said he could not positively say that the conversation he had with Baca took place on January 30th.

Q. (By Mr. Garrett): Do you recall discussing this letter with Mr. Kiser? A. No, sir.

Q. Do you recall discussing on or about January 31st, 1951, the union organizing activities with Mr. Kiser?

A. Just what we normally talk about.

Q. He was back on the job full time when you discussed the union activities?

A. He might have been.

(Testimony of Richard Gildart.)

Q. I see. If he was, you might have discussed the union activities with him? That is part of his business and you are concerned with him.

A. I was not concerned, but any information he had to tell me I was all ready to listen.

Q. He was your immediate superior, you would give him what information you received about the union organizing campaign, is that right?

A. Not necessarily.

Q. Well, you did have discussions with Mr. Kiser on that subject, did you not, around the end of January 1951?

Mr. Orloff: Objected to as being asked and answered.

Trial Examiner Myers: Did you talk to Mr. Kiser at all, [207] at any time about the union activity of the employees there?

The Witness: Yes.

Trial Examiner Myers: About when did you first talk to Mr. Kiser about the union activity of the employees?

The Witness: That was after Mr. Maldonado had already talked to him in regard to the chances of opposition.

Trial Examiner Myers: We don't know when Mr. Maldonado had the conversation with Mr. Kiser. Can you give us some date on that?

Mr. Orloff: Approximate date is what the Examiner means. He doesn't expect you to give him the exact date.

(Testimony of Richard Gildart.)

Trial Examiner Myers: Was it before your talk or after your talk with Baca?

The Witness: It was before.

Q. (By Trial Examiner Myers): How long before was it that you talked to Mr. Kiser about the union activities of the employees?

A. It couldn't have been very long.

Q. The record shows that they didn't start the activities—that is, the record up to the present time—until around the 24th of January of this year.

A. I talked to Baca around the 30th.

Q. And on the 31st they delivered a letter to the company, the union did.

With all that information in mind, could you tell us [208] about the first time you talked to Mr. Kiser about the union activities with the employees. When I say the union activities, I mean the activities on behalf of the carpenters' union.

A. Well, it was before I talked to Baca and it was—the date would have to be fixed when we discussed the survey, which was before I talked to Baca, it would have to be. That would mean we discussed it somewhere between the 26th maybe, or the 25th.

Q. Of January? A. January.

Q. In this talk with Mr. Baca—I am just asking you these questions to try to fix a date. In this talk with Mr. Kiser did Mr. Kiser talk to you about the union writing a letter to the company and claiming that the union represented a majority

(Testimony of Richard Gildart.)

of the employees and asking you whether you knew anything about that? A. I don't remember.

Q. Was there anything said in your talks with Mr. Kiser about the union?

A. There was something regarding the union giving them a notice about the men bargaining.

Q. Claiming in the letter that they represented them?

A. What they actually claimed, I don't know.

Q. That they represented the employees?

A. Something to that effect. [209]

Q. Isn't that when you made the survey?

A. No, I made the survey on Maldonado's statements.

Q. Of what?

A. As I got it from him, he came up to Mr. Kiser and told him that some of the boys—that there was something about a union going on and he wanted to know what he could do, what was going to happen.

As I heard it, Mr. Kiser told him he didn't know what he could do, and Maldonado said that there are some boys that don't want the union. As I understand it, Mr. Kiser asked him how many and of course Alfred, he had a few names of employees and I believe he showed them to him.

Mr. Kiser said that wasn't enough. He said you you couldn't do anthing with that and Maldonado went out and came back and said there were some more. At this time I entered the picture and at that time Alfred said, "Is that enough?"

(Testimony of Richard Gildart.)

Mr. Kiser wasn't too sure, and I said, "I will find out," so I made the survey.

In regard to the letter, I don't know anything about that.

Q. I thought that might fix the date of your first conversation with Mr. Kiser about the activities of the employees with respect to the Carpenters Union.

Q. (By Mr. Garrett): Let's go back, Mr. Gildart, and fix these events with respect to the first talk with Mr. Baca in your office, whether it was on January 30th, as you have fixed [210] it, or on some other date.

As of the first conversation with Baca in your office you had already talked with Kiser about the union, had you not? A. Yes.

Q. And as of that date when you talked to Baca in your office, Maldonado had also talked to Mr. Kiser about the union, according to your information, right? A. That would be correct.

Q. But as of that date when you first talked to Baca in your office, you cannot say that you had seen the letter which I have shown you as General Counsel's Exhibit No. 3 here?

A. No, sir. I see a lot of letters.

Q. You wouldn't be sure one way or the other?

A. No.

Q. But the letter is dated January 31st and you think you talked to Baca in your office on January 30th? A. That is right.

Q. Now, were you present when Maldonado

(Testimony of Richard Gildart.)

talked to Mr. Kiser in the conversation I have just mentioned which you knew about or were you present at that conversation or did you only hear about it?

A. No, I only heard about it.

Q. Did you hear about it from Maldonado or Mr. Kiser?

A. I heard about it upon entering the office after he had come back. [211]

Trial Examiner Myers: After who had come back?

The Witness: I happened to enter the office for an occasion.

Q. (By Mr. Garrett): In other words, about the time he left you happened to go into Mr. Kiser's office on some business, right? A. Yes.

Q. Then, naturally Kiser told you what Maldonado had been saying?

A. No, they were talking and I listened and I took it upon myself to listen and say, "I will find out."

Q. Had you known Maldonado before that?

A. Yes.

Q. He was an old friend?

Trial Examiner Myers: Did you know him socially and meet him outside the business?

The Witness: Absolutely.

Q. (By Mr. Garrett): And he worked in the plant for at least four or five years while you were working there, right? A. Yes.

Q. Now, you have told us there were three

(Testimony of Richard Gildart.)

speeches that Mr. Bud Rehrig made to the men, in general, right?

A. Yes, I believe that is right.

Q. The first one, the day before the election, February 22nd, that was alongside of the production line? [212]

Trial Examiner Myers: That was not the first one.

Q. (By Mr. Garrett): That was the second one? A. Yes.

Mr. Garrett: Thank you for correcting me.

Q. (By Mr. Garrett): The first one he made sometime previous to that, was that made alongside the production line or was it over by the entrance to the machine shop where the bulletin board is?

A. I will say they were all in the vicinity of the production line.

Q. All three of these talks were in the vicinity of the production line?

A. Not all three of them. The last one was made in the yard.

Q. The second one was made alongside of the production line; where was the first one made?

A. In the vicinity of the production line.

Q. But at a different point on the production line?

A. It might have been, depending on where he was standing.

Q. The third one you say was made out in the yard, right? A. Yes.

(Testimony of Richard Gildart.)

Q. I take it all the men gathered there, right?

A. Yes.

Q. The second one, that one of February 22nd, was made the afternoon just before quitting time?

A. Yes. [213]

Q. But the third one, the one that was made later, was made at the time of the 10:00 o'clock break in the morning, was it not?

A. I wouldn't hold myself to that.

Q. It was in the morning, anyhow, wasn't it?

A. That one I don't know the exact position of the meeting at all.

Q. You don't remember the time of day, but you do remember the speech, don't you?

A. Part of it, yes.

Q. Substantially, right? A. Yes.

Q. You were there? A. Yes.

Q. In that speech Mr. Rehrig said that if he had known what the law was he would not have said what he said in the speech on Washington's Birthday, isn't that substantially what he said in his last talk?

A. Are you asking me or telling me?

Q. Isn't that what he said?

A. I can't say, I don't remember.

Trial Examiner Myers: Wait a minute. When he referred to the speech on Washington's Birthday, that was the speech the day before the election.

The Witness: That was the second speech. [214]

Q. (By Mr. Garrett): Quite right. We are getting to understand it.

(Testimony of Richard Gildart.)

Trial Examiner Myers: What Mr. Garrett says —and I am not asking you the question—didn't Mr. Rehrig say in the third speech that if he had known that his remarks made in the second speech were against the law, he would not have made them?

The Witness: In all of these speeches I don't stand nearby, I stand away and I don't pay too much attention to what is going on.

Q. (By Mr. Garrett): Is your hearing all right?

A. Yes.

Q. Would you mind answering the question to the best of your knowledge?

A. I wouldn't say I heard that because I wouldn't know. I wouldn't be sure. If I did exactly hear it, I would say so.

Trial Examiner Myers: Did Mr. Rehrig say anything in the third speech about the remarks he had made to the employees the day before the election? Did you hear him make any statements about those remarks?

The Witness: He talked about the bonus. He talked about the men bargaining, doing what they wanted.

Trial Examiner Myers: No, I am talking about the third speech. Did he make any reference to his prior statements in his second speech? [215]

The Witness: I tell you at the third speech I was pretty far away. I was even farther away than at the other two.

Trial Examiner Myers: Then your answer is

(Testimony of Richard Gildart.)

that you don't recall him making any such statement?

The Witness: Yes.

Q. (By Mr. Garrett): In the third speech did he say, substantially, that he would not have said in his Washington's Birthday speech certain things if he had know it was against the law?

A. I wouldn't know if he said it or not.

Q. In the third speech did he say he regretted some of the remarks he had made in the Washington's Birthday speech, the second speech?

A. The second speech I don't recall him saying anything of the sort.

Q. Do you recall in his third speech, the last speech, his saying to the people there, while you were standing there, that he regretted some of the statements he made in his previous talks?

A. I might have been present, but I never heard it.

Q. Do you recall his saying in the last speech he made that he had been informed that it was unlawful for him to have made mention and offers of bonuses in his second speech?

A. That I heard.

Q. Do you recall him saying further that although that was [216] unlawful under the laws of the United States, he didn't give a damn about those laws, using those very words, the word "damn"?

A. He might have.

Q. He did, as a matter of fact, did he not? You are under oath? A. I think he did.

(Testimony of Richard Gildart.)

Q. Now, on this bulletin board there was a sign during the past week soliciting contributions for attorney fees. Do you recall seeing that sign?

A. Yes.

Q. Was that on the bulletin board accompanied by a box for the receipt of those contributions at the bottom of the bulletin board or somewhere close to the bulletin board? A. I saw it.

Q. Were there envelopes provided for the contributions to be dropped into the box?

A. From what I could see there were.

Q. That was a solicitation to make $100.00 for attorney fees, right?

A. I think that is right.

Q. Do you know that that solicitation was in connection with attorney's fees to be spent in this case?

Mr. Orloff: I object to the use of the words, "You know that that was——"

Mr. Garrett: He can always say no. [217]

Trial Examiner Myers: Overruled.

The Witness: Did I know that?

Mr. Garrett: Yes.

The Witness: Sure, I knew.

Q. (By Mr. Garrett): Was the message on that bulletin board written in chalk? A. Yes.

Q. Was it printed or in running writing?

A. I didn't pay any attention.

Trial Examiner Myers: You mean script?

The Witness: I might be wrong, but I think there was some of both.

Mr. Garrett: Script, that is right.

(Testimony of Richard Gildart.)

The Witness: Part of it was in writing and some of it printed.

Q. (By Mr. Garrett): All done in chalk?

A. That is right.

Trial Examiner Myers: Who put that sign up there?

The Witness: I believe Mr. Telke did.

Trial Examiner Myers: Did you see him do it?

The Witness: I seen them up around there.

Trial Examiner Myers: Did you see him?

The Witness: There were two or three of them around there.

Trial Examiner Myers: Who put it up there?

The Witness: Agustin Ortega. [218]

Trial Examiner Myers: Who else was there?

The Witness: Edward Hinojosa.

Trial Examiner Myers: Did you say anything to those employees?

The Witness: No.

Trial Examiner Myers: You didn't reprimand them for putting it up?

The Witness: No, that is their business.

Q. (By Mr. Garrett): Was the plant closed over the week end or did you work over the week end? A. This week end?

Q. No, the previous week end.

Trial Examiner Myers: Do you mean last Saturday and Sunday?

Mr. Garrett: No, I mean the week end before the last week.

The Witness: Well, the plant is never closed.

(Testimony of Richard Gildart.)

Q. (By Mr. Garrett): Does the plant work five days? A. Yes.

Q. Does the day shift work five days?

A. Not all of them.

Q. There aren't any shifts that work more than five days?

A. Right.

Q. Now when this matter was written on the blackboard, was that over the week end or sometime on Monday morning?

A. Over the week end. [219]

Q. Can you recall whether on Sunday or the previous Saturday?

A. Friday or Saturday, I don't know which of the two.

Q. Who was doing the writing?

A. Mr. Telke.

Q. That is Howard?

A. Yes, Howard Telke.

Q. How do you spell his last name?

A. T-e-l-k-e.

Q. Telke and Hinojosa were there, and you were there also?

A. No, I wasn't there. There was another fellow, Agustin Ortega.

Q. Besides these three men and yourself, was anyone else in the plant at that time?

A. I wasn't.

Q. I want to be sure you understand me. Besides these three men at the time was there anyone else in the plant, so far as you know?

(Testimony of Richard Gildart.)

A. Oh yes, there was more men in the plant, sure.

Q. Was this during or outside regular working hours? A. No, it was outside.

Q. When was the sign put up?

A. I believe it was on a Saturday.

Mr. Orloff: He said before he thought it was Friday or Saturday.

The Witness: I know there was men around because there [220] was activity.

Q. (By Mr. Garrett): These men, Telke, Hinojosa and Ortega came down to the plant Saturday especially to put that sign up? A. No, sir.

Q. There was English writing and a Spanish translation underneath, is that right?

A. That is right.

Q. That is right? A. That is right.

Q. This sign asked for the contributions in $2.00 donations, did it not?

A. I believe that is right.

Q. And it clearly stated that it was for the purpose of paying legal fees in this case, right?

A. I don't know.

Trial Examiner Myers: Did you contribute?

The Witness: No.

Trial Examiner Myers: Did you know what lawyers was to get the fee?

The Witness: I did know.

Trial Examiner Myers: Mr. Gorman?

The Witness: Yes, that is the name.

Trial Examiner Myers: Not Mr. Orloff?

(Testimony of Richard Gildart.)

The Witness: No, sir.

Trial Examiner Myers: Who is Mr. Gorman?

The Witness: I don't know, I have never seen him before.

Trial Examiner Myers: Do you know whom he represented?

The Witness: He was supposed to represent us.

Trial Examiner Myers: Who is "us"?

The Witness: The employees in the company.

Trial Examiner Myers: Not the company?

The Witness: No, sir.

Q. (By Mr. Garrett): I take it what you know about where the money went, you found that out somewhere else; the sign didn't say to what attorney?

A. The men that work along with them—I have conversations with every man in there, every employee in there. Just like I was one of the workers, I know what is going on.

Q. By the way, your previous manager who had the bonus plan, the first bonus plan of the company there, you worked along with him as his assistant, did you not, for some time?

A. More or less, yes.

Q. Then, eventually you replaced him, correct?

A. That is correct.

Q. And I suppose you talked to him and he talked to you, did you not? A. That is correct.

Q. You became superintendent when he was fired, right? A. Right.

Q. He had had some bad ideas which you felt were not as good [222] as your ideas?

(Testimony of Richard Gildart.)

A. That is right.

Q. When you talked to the boys, did they tell you anything about what lawyer the money was going to? A. Naturally.

Q. That is how you found out the money is going to Gorman rather than to Orloff?

A. The thing was done one way. They hired the lawyer and that was it.

Q. You had not known Orloff or Gorman?

A. I have never seen Gorman and this is the first time I have seen this man in my life.

Trial Examiner Myers: Was this signed by anybody, the notice on the blackboard?

The Witness: Was it signed by anybody?

Trial Examiner Myers: Did any individual put their name under the writing on the blackboard?

The Witness: I didn't notice.

Q. (By Mr. Garrett): Was the sign left up until Friday?

A. I don't know when they took it down. I recall it being taken down or ended, but I don't know exactly the date.

Q. Did you have any information concerning any pictures being taken of it prior to its being erased? A. No.

Q. Do you know who took it down? [223]

A. Mr. Telke, I believe.

Q. Did the sign say to write your name on the envelope before you put it in the box?

Mr. Orloff: I am going to object to what the sign might have said. If they have some pictures of it,

(Testimony of Richard Gildart.)

let them introduce it. This is going pretty far afield.

Trial Examiner Myers: Have you got a picture of it?

Mr. Garrett: No.

Mr. Orloff: This talk about any picture being taken—there has been evidence that is not the best evidence as to what the sign said.

Trial Examiner Myers: It had been erased. How can they produce it if it has been erased?

The Witness: The testimony of any of the employees there, you can ask them. They will all say what is on there just like I can tell you.

Q. (By Mr. Garrett): You can't remember any signature on the sign, correct?

A. That is right.

Q. Did the sign say anything about writing your name on the envelope before you dropepd the contribution into the box?

A. I don't think so.

Q. Did you see the envelopes in the box?

A. In the box? No. I saw the envelopes outside of the box before they were put in. [224]

Q. There was a pile of envelopes there?

A. That is right.

Q. Were they plain or did they have writing on them?

A. As far as I could see they were plain.

Q. Were they about this size (indicating)?

A. No, I would say they were smaller.

Q. They were about what we call letter size, the small correspondence size, is that correct?

(Testimony of Richard Gildart.)

A. That is right.

Q. These envelopes came from Mr. Kiser's office, did they not?

A. I don't know where they came from.

Q. But they were company envelopes from the office up front? A. I don't know.

Q. Did you talk to Mr. Kiser about these envelopes?

A. No, sir, Mr. Telke could tell you that.

Q. Mr. Telke would know?

A. That is right.

Q. What was done about keeping the money at night so that the envelopes would not be stolen.

A. Mr. Telke could also tell you that.

Q. As far as you know you didn't collect the envelopes? A. That is right.

Q. You knew he did? You saw him collect them?

A. No, sir.

Q. How did you know he collected them? [225]

A. That is what he was supposed to do.

Q. They were taken away and put in safekeeping?

A. I can't tell you, because I don't know.

Q. This sign was up there for at least four or five days? A. I guess so.

Q. The envelopes contained in that box were not left there at night?

A. I don't know. I had nothing to do with the envelopes or the writing. I can't tell you what happened to them if I don't know.

Q. But you passed the point at which the ma-

(Testimony of Richard Gildart.)

chine shop enters into the entrance, you pass that point many times a day?

A. I pass through the hall.

Mr. Orloff: I think the question has been asked and answered. He said he doesn't know and he has repeated it several times.

Trial Examiner Myers: Sustained.

Q. (By Mr. Garrett): When you talked to Mr. Kiser prior to his illness you limited your discussion to your plan to have an inside union that would represent the men department by department, is that correct? A. That is right.

Q. And did he approve of this plan, in principle? A. Who?

Q. Mr. Kiser. [226]

A. He didn't have much to do with that.

Q. Did you have a discussion with him about it?

A. I don't think we did. I think we formed it and went right up and gathered among ourselves.

Q. Well, now, wait a minute. Don't you recall—try to think back—it was my impression that early in this examination you testified that you had a discussion with Mr. Kiser about the plan before he became ill?

A. About the plan, yes. You asked me about the individuals elected to form a group.

Q. I asked you about the group plan. That is what you discussed with Mr. Kiser, did you not?

A. That is right.

Q. Did he signify that he had any objection to that plan? A. No, sir.

(Testimony of Richard Gildart.)

Q. Did he approve it, or what?

A. He approved it.

Q. Did you know prior to the time he was out on account of illness that he substantially approved of the plan? A. That is right.

Q. Now, while Mr. Kiser was out ill, did you have any discussions with Mr. Rehrig about the plan?

A. I might have mentioned it to him inasmuch as he comes in and goes out.

Q. Did he indicate what his opinion of it was?

A. His indications were to do what you think is best or to do what the men want and that is all he would ever say.

Q. As far as their representation is concerned?

A. That is right.

Q. I take it up to the time Mr. Kiser came back from his illness, you never had talked to him and tried to get his ideas on the bonus for the men or the company's approval. That was taken up with Mr. Kiser after he got back?

A. No, but it involves a lot of——

Q. I see.

Mr. Orloff: I think the witness should be allowed to finish his answer. He said, "It involves a lot of——"

Trial Examiner Myers: Did you finish your answer?

The Witness: The formation of a plan of that nature involves a lot of negotiations with the wage and hour controls, I believe, or some similar organi-

(Testimony of Richard Gildart.)

zation, that help you set up the plan. We have to go in with the profit-sharing organizations to see that our deal is set up right. You can't make one of these things overnight. You have to make sure they are right.

Q. (By Mr. Garrett): Did you ever have any discussions with Mr. Rehrig about the bonus plan prior to the time be brought it out in his Washington's Birthday speech, of February 22nd?

A. Prior to that, I believe I did, one time or another.

Q. Now, were your discussions with Mr. Rehrig about a bonus [228] prior to his Washington's Birthday speech after you had discussed the bonus with Mr. Kiser?

A. It was prior to and after, right.

Q. Prior to Mr. Rehrig's Washington's Birthday speech, but after your bonus discussion with Mr. Kiser, is that right? A. Right.

Q. Did you have one or more than one conversation with Mr. Rehrig about the bonus?

A. Oh, maybe two or three discussions. Not discussions; they were to let him know what we had in mind.

Trial Examiner Myers: Conversations, is that what you mean?

The Witness: Yes, you could call them conversations. There were possibly two conversations.

Trial Examiner Myers: When you say possibly two, do you mean approximately?

The Witness: Yes. We discussed the bonus plan

(Testimony of Richard Gildart.)

and he determined the quantity. It was up to him to determine the amount.

Q. (By Mr. Garrett): Do you remember in these conversations you had with Mr. Rehrig about the bonus whether it was after you had taken it up with Mr. Kiser before Mr. Rehrig's Washington's Birthday speech? And do you remember, if ever, in these discussions the percentage amount of 25 per cent of the net profits was discussed? [229]

A. Do I remember whether it was discussed?

Q. Yes. A. Yes, they were discussed.

Q. The 25 per cent was mentioned in Mr. Rehrig's Washington's Birthday speech?

A. Yes.

Q. The bonus came out as a 25 per cent bonus. Did you know he was going to bring it out as a 25 per cent bonus?

A. No, that was up to him.

Q. Do you know prior to the time you heard him offer the bonus that he was going to offer a bonus?

A. I didn't know whether he would offer it then or not.

Q. You didn't think he would. You had no understanding with him either that he would offer a 25 per cent bonus or that he would offer a bonus at all?

A. Under those conditions you couldn't do much with the union in the activity it was. The form of the bonus plan was to go ahead and I didn't know what the turnout would be, but I wanted it to go

(Testimony of Richard Gildart.)

ahead. Maybe that is why he went ahead and mentioned it.

Q. At the time he made the offer in the Washington's Birthday speech, you didn't have advance information that he was going to offer it then?

A. No, I didn't know it at that time.

Mr. Garrett: May I have that answer read?

(Answer read.)

Q. (By Mr. Garrett): After you came in there and found Mr. Kiser talking to Maldonado, I take it you suggested the survey as your own idea, is that right? A. Right.

Q. It wasn't suggested either by Maldonado or Mr. Kiser? A. No, sir.

Q. But they thought it was a good idea when you brought it up? A. I guess they did.

Q. Did you use the pay roll or what?

A. No, just scrap sheets that looked like books in the office there.

Q. Are they bound?

A. They are a bunch of surplus transit blanks we happened to get ahold of as scratch paper.

Q. Did you write the names of the employees down so that as you passed from employee to employee you would only have to make a check mark?

A. No, I wrote their name and I think I put a "1" in front of their name if they were for the union. If they weren't I think I left it blank or something to that effect.

Trial Examiner Myers: Or vice versa?

The Witness: Yes.

(Testimony of Richard Gildart.)

Q. (By Mr. Garrett): This check that you put down, did you put it down in red pencil? [231]

A. No, the same pencil.

Q. Now, these names then, you placed them in the book in your own writing, I take it?

A. Yes.

Q. You didn't copy them from any list?

A. No, I wrote them as I went along.

Q. You wrote the names as the names occurred to you, is that right? A. That is right.

Q. As you went along you stopped some of the men and wrote their names down. Others you skipped by, is that right? A. That is right.

Q. You used that book as the basis of the report you made?

A. No, just the basis of a majority survey. All I was interested in was the number.

Q. Was the information being prepared for you or for someone else?

A. For my information, too.

Q. For your information, too?

A. That is right.

Q. Did you report the results of your survey to Mr. Kiser? A. That is right.

Q. Did you discuss it with him? A. Yes.

Q. Did you have any discussion about the results of your [232] survey with Mr. Rehrig?

A. I believe we did.

Q. I see. The time came when you had to fire some men, is that right? A. That is right.

Q. Seven of them? A. Right.

(Testimony of Richard Gildart.)

Q. But this firing of these men wasn't until after the election, was it?

A. Some of them, yes.

Q. It was before the election?

A. Some of them before. Some of them were before and some were after.

Trial Examiner Myers: What men?

Mr. Garrett: The seven men.

The Witness: The layoff was before.

Q. (By Mr. Garrett): Did you lay them off first and then fire them? A. No.

Q. Were they fired outright?

A. They were laid off. When you fire a man you lay him off for a reason. Whey you lay him off it is for a reason, but it is not the same type.

Q. They were permanently paid off?

A. Yes. [233]

Q. Just try to think hard and tell us when these men were laid off.

Mr. Orloff: I object to the question as being asked and answered.

Trial Examiner Myers: Sustained. Doesn't General Counsel's exhibit show that?

Mr. Garrett: The names are on the February 7th pay roll.

Trial Examiner Myers: The last page of General Counsel's Exhibit No. 16 shows they were on the February 14th pay roll, but were laid off prior to the date of the election.

Mr. Orloff: That is a different group. One is before the fourteenth and one is afterwards. These were

(Testimony of Richard Gildart.)

eligible to vote but were terminated prior to the time of election.

Trial Examiner Myers: That is not the group he was talking about?

The Witness: I am talking about a group that was laid off.

Mr. Orloff: He is talking about a group that was laid off prior to the fourteenth.

Trial Examiner Myers: How many were laid off, approximately? Here is the pay roll of the fourteenth.

Mr. O'Brien: I think he wants the pay roll of February 7th and compare it with the fourteenth.

Mr. Orloff: Compare the pay roll of the seventh with the eligibility list is what he means.

Q. (By Mr. Garrett): So you had a meeting about laying these [234] men off? A. Right.

Q. Representatives from each of these departments you told me about when I first started talking to you this afternoon, is that right?

A. That is right.

Q. You understood that these men that met with you as department representatives had been selected? A. That is right.

Q. By each of the different departments, is that correct? A. That is right.

Q. Was that selection made under any plan outlined by you? A. No, sir.

Q. Or the company? A. No, sir.

Q. How did you know how that selection was made, then?

(Testimony of Richard Gildart.)

A. I believe they got together. Probably I didn't get them together, but I suggested the idea.

Q. Suggested the idea to those when who were selected?

A. No, to the men that were doing the selecting, which is the employees.

Q. Was that suggestion made in any gathering together of the production employees?

A. I don't remember. I don't remember whether it was orally, infiltrating through the departments, or whether I got them [235] together.

Q. You put the word out either way. "Mr. Gildart says——," and one passed it to the other?

A. If you want to put it that way, yes.

Q. You indicated that department heads were to be selected, that was your suggestion?

A. That is right.

Q. Was that for the purpose of consulting with you on the discharge or for the purpose of starting an organization?

A. Both.

Trial Examiner Myers: Suppose we adjourn now until tomorrow morning at 9:30. Is that agreeable?

Mr. Orloff: Before we adjourn——

Trial Examiner Orloff: Do you want this on the record?

Mr. Orloff: Yes. There are several men who have been subpoenaed on behalf of the complainant who have been sitting here long after they have testified. They can be doing work at the plant if they are no

longer needed, and I think they should be excused unless they are required to appear again.

Mr. O'Brien: They are all excused permanently now. I asked them to remain this afternoon in case some matter might come up, but I will have no further need of them now.

Trial Examiner Myers: All the witnesses who have been subpoenaed in this proceeding and who have already testified are excused from this hearing and are requested to return to [236] the plant in their normal shifts.

Is that what you want?

Mr. Orloff: Thank you.

Trial Examiner Myers: We will adjourn now until 9:30 tomorrow morning.

(Whereupon, at 4:15 o'clock p.m., Tuesday, August 28, 1951, the hearing was adjourned until tomorrow, Wednesday, August 29, 1951, at 9:30 o'clock a.m.) [237]

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. O'Brien: We are ready.

Trial Examiner Myers: Mr. Garrett, are you ready to proceed?

Mr. Garrett: Yes.

Trial Examiner Myers: Mr. Orloff, are you ready?

Mr. Orloff: Yes.

Trial Examiner Myers: Mr. Gildart, will you kindly resume the witness stand?

RICHARD GILDART

a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Trial Examiner Myers: Mr. Garrett, have you any further questions to ask this witness?

Mr. Garrett: Yes, a few.

Trial Examiner Myers: Will you kindly proceed?

Cross Examination—(Continued)

Q. (By Mr. Garrett): Mr. Gildart, in the conference you had with Mr. Baca after you had called him to your office on or about January 31st, you asked him whether there was anything personally directed against you in his activities, and he said there was not, is that correct? [241]

A. That is correct.

Q. You asked him whether it had anything to do with family matters, and he said it did not, is that right? A. That is correct.

Q. And you asked him what he expected to accomplish by bringing the union in, and he said, "More money," right? A. Right.

Q. You asked him then how he knew or why he thought the company could stand a union?

A. I believe I asked him that; whether it was at that time or another time I don't know, but I believe I asked him such a thing.

Q. You did ask him that? A. Yes.

Q. If the union did come in, you said the company would only be able to operate three days a week?

(Testimony of Richard Gildart.)

A. I believe I did, on my own assumption.

Q. Was that partly because you understood the union would demand that the company's wages be increased to the union scale?

Mr. Orloff: Objected to as calling for a conclusion of the witness.

Trial Examiner Myers: Overruled.

Mr. Orloff: He said because he understood the union might demand——

Trial Examiner Myers: I will sustain the objection. [242]

What did you base your statement on?

The Witness: My statement as to what?

Trial Examiner Myers: You said you told Baca the company would only operate three days a week?

The Witness: I assumed that under some sort of a wage scale. I don't know what it would be. The fact that my wood department or my line, which operates much faster than the wood department, would be affected, in which case the line would probably have to close down periodically to keep the materials caught up.

Q. (By Mr. Garrett): Well, Baca had told you what he expected to accomplish by bringing in the union, which was more money, is that right?

Mr. Orloff: Objected to as having been asked and answered. I don't think we need to go over it again.

Trial Examiner Myers: Overruled.

The Witness: What was the question?

Trial Examiner Myers: Will the reporter please read the question?

(Testimony of Richard Gildart.)

(Question read.)

Q. (By Mr. Garrett): He told you that, do you recall? A. Something to that effect.

Q. You understood that he meant higher wages, did you not? A. Yes, in a way.

Q. That was the union objective and Baca told you that was it? [243]

A. That was his statement.

Q. You had no reason to doubt it, did you?

A. I didn't give it a thought.

Q. As a matter of fact, the men were told that the union would try to get them more money?

Mr. Orloff: Objected to as calling for a conclusion of the witness, as to what the men were being told. Unless he was present he wouldn't know what they were being told.

Trial Examiner Myers: Sustained.

Q. (By Mr. Garrett): There is evidence here, Mr. Gildart—I don't know whether you were in attendance when the testimony was given or not—that on or about February 5th there was a phone call between the company's office and the union's office, as a result of which the union filed its petition for certification with the National Labor Relations Board. That was on or about February 5, 1951, the date the petition was filed.

Do you recall whether or not on February 5th Mr. Rehrig was in daily attendance at the plant?

A. I don't recall.

Q. Does he usually come in there every day?

A. No.

(Testimony of Richard Gildart.)

Q. He doesn't usually keep regular hours?

A. No.

Q. Mr. Kiser does, I understand? [244]

A. Yes, when he is in.

Trial Examiner Myers: What do you mean, "when he is in"?

The Witness: I didn't know whether he meant when he was ill or not.

Trial Examiner Myers: Under normal circumstances Mr. Kiser is there every day?

The Witness: Yes.

Q. (By Mr. Garrett): And do you know anything about a note being sent to the union's office on or about February 5th?

A. I wouldn't know about the exact arrival.

Q. Did you have a discussion on or about February 5th concerning the sending of a note to the union?

A. On or about February 5th, I would know.

Q. Did you have any discussion either with Mr. Rehrig or Mr. Kiser at any time concerning the advisability of requiring the union to be certified before bargaining?

A. If I had a discussion it might have been with Mr. Kiser. I think I recollect it might have been.

Q. Had you been informed prior to February 5th that the union had demanded bargaining with the company?

A. The fact that I discussed it with someone, which I believe was with Mr. Kiser—I don't know whether the date was right or not.

(Testimony of Richard Gildart.)

Q. Was it after the time that Mr. McKinzie, Mr. Cordil and Mr. Starkey came in there, which they have testified to—— [245]

Mr. Orloff: I object to that.

Mr. Garrett: I will withdraw the question.

Q. (By Mr. Garrett): Do you recall, Mr. Gildart, when Mr. McKinzie, Mr. Starkey and Mr. Cordil, who was sitting by me yesterday, came into the company premises and into the company's office on or about January 31st, when they talked to Mr. Bud Rehrig in the office?

A. If it was on the thirty-first or around there, I don't know. I remember them being in the office.

Q. You recall that occasion? A. Yes.

Q. I take it you were not present at the conversation at that time?

A. No. I frequently visit the office for shipping papers, and so forth.

Q. Were you in there during any of the time they were in there talking to Mr. Rehrig?

A. Not in their office at all. I was in the adjoining office where the secretaries are employed.

Q. I gather there is a glass partition between?

A. Yes.

Q. Could you see them?

A. Yes, as I passed I could see them.

Q. Was Mr. Kiser in there with them?

A. I don't remember. [246]

Q. Now, after that occasion, did you learn from anyone that the union had demanded recognition by the company? A. I don't remember.

(Testimony of Richard Gildart.)

Q. You don't remember? A. No, sir.

Q. Did you know after that meeting that the union was demanding recognition of the company?

Mr. Orloff: To which we object as calling for a conclusion of the meeting. He was not in the meeting. He doesn't remember whether he had any conversation about it, and it calls for a conclusion.

Trial Examiner Myers: Overruled.

Q. (By Mr. Garrett): Do you know that the union was demanding recognition?

A. In a roundabout way by discussing it with someone, I don't know who.

Q. You knew it somehow? A. Right.

Q. Now, after the election of the department representatives there was a meeting of those representatives, at which you explained the company's intention to make these layoffs, is that correct?

A. My intentions of the layoffs.

Q. Your intentions?

A. That is right, sir. [247]

Q. There was a meeting held. Where?

A. In one of the offices in the front.

Q. In Mr. Rehrig's office?

A. I believe it was.

Q. Was he there? A. No, sir.

Q. Was Mr. Kiser there?

A. I believe Mr. Kiser was in the adjoining office at work.

Q. This was the first meeting of the department representatives that you knew of, is that right?

A. Yes.

(Testimony of Richard Gildart.)

Q. About what time of day was it?

A. I believe it was in the afternoon.

Q. When is the quitting time of the first shift, 4:00 o'clock? A. 3:30.

Q. Was it prior to 3:30, this meeting that took place? A. I believe it was after 3:30.

Trial Examiner Myers: Was anybody present from the night shift?

The Witness: Yes, the night shift was present.

Trial Examiner Myers: Who represents the night shift?

The Witness: The night shift is represented by the same person.

Trial Examiner Myers: They knew about it?

The Witness: Yes. [248]

Q. (By Mr. Garrett): Were any of these department representatives workers on the night shift? A. No, sir.

Q. They all worked on the day shift?

A. Yes.

Q. You were present, and neither Mr. Rehrig nor Mr. Kiser were. Is that right? A. Right.

Q. You are not sure about Mr. Kiser?

A. No, I am not exactly sure. He might have stepped in. I think he was in the adjoining office.

Q. Maldonado was there? A. Yes.

Q. Coffey was there? A. Right.

Q. Is Mr. Coffey an employee of the company now? A. No, sir.

Q. When did he leave the company?

A. He left—I don't know now exactly. It has

(Testimony of Richard Gildart.)

been maybe two months. He just took up and went to attend to some business in Memphis or something like that.

Q. Was Marquez there? A. Yes.

Q. Was Telke there? A. Yes. [249]

Q. Was Baca there? A. Yes.

Q. Any others? A. Carlos Taylor.

Q. What department was he from?

A. The line, the assembly line.

Q. Maldonado was a trucker?

A. No, Maldonado was in the metal shop.

Q. Telke is a machinist, is that right?

A. Yes.

Q. Marquez? A. Wood department.

Q. Was Baca on the line?

A. Baca and Carlos Taylor were on the line.

Q. Was that before the election? A. No.

Q. You didn't know at the time you called this meeting whether there was going to be any bonus system declared?

A. Well, in a half sort of way I knew it was being brought up.

Q. At the time of this meeting Mr. Rehrig hadn't told you whether he would go for it?

A. No, the only knowledge of the bonus plan was what I had in mind.

Q. You learned that he would go for the bonus plan only [250] through his speech of February 22nd, the day before the election?

A. In between the time he did come in and I heard him discuss it that he might—or, rather he

(Testimony of Richard Gildart.)

thought it was a good idea, which I more or less mentioned to him, and the only official statement was at the time of the second speech.

Q. And so there was no discussion of the bonus plan at this first meeting of the department representatives?

A. There was probably discussion, but at that time it was tied up with the freezing of the wages and other complications that we couldn't see launching it at that time.

Q. Was the principal business of this meeting the contemplated layoffs?

A. Yes.

Q. Was any particular attention given to any other business?

A. Very little, if any, to anything else.

Q. Was there any action taken at that meeting by the department representatives toward going further with your organization of the department representatives?

A. Yes, we discussed an advancement into the group we were forming as far as we could go and what we could do.

Q. That is, you discussed the perfecting of an inside employees' representation plan?

A. Yes.

Q. Along the lines of the union, the members of which would [251] be confined to those working for Rehrig-Pacific. Is that correct?

A. That is right.

Q. And which union would represent all em-

(Testimony of Richard Gildart.)

ployees of the plant in matters concerning wages, hours and working conditions, correct?

A. Right.

Q. Were there any votes taken at this meeting we are talking about, or decisions made concerning the perfecting of the organization of a union composed exclusively of the Rehrig employees?

A. No. Under the conditions as complicated as they were, we couldn't clarify it too well.

Q. It was merely being discussed at that time by these men who had been appointed department representatives and yourself? A. That is right.

Q. And as yet no system had been worked out for giving any evidence of membership in any union to the individual employees?

A. No complete system could possibly be worked out at that time.

Q. And it had not been worked out at that time?

A. No complete system could possibly be worked out.

Q. Had any incomplete system been worked out? Had the organization gone any farther?

A. Under the circumstances I was only trying to forge ahead [252] as much as I possibly could.

Q. Under the circumstances? A. Right.

Trial Examiner Myers: What do you mean, "under the circumstances"?

The Witness: The kind of procedure we might have to take into order to properly perfect the system.

Q. (By Mr. Garrett): That was only the first

(Testimony of Richard Gildart.)

meeting of the group that you testified to. There was another meeting, was there not?

A. Yes, a group of that type.

Q. And I suppose you discussed the contemplated layoffs with the department representatives?

A. Right.

Q. The contemplated layoffs were given the approval of the department representatives at that time? A. That is right, sir.

Q. In other words, they told you that whatever you did in that respect was all right with them, is that correct?

A. No, sir, not exactly. The purpose of that meeting was for me to notify them of the purpose of the layoff, and that was it.

Q. There were to be six layoffs. Did you advise them? A. The exact number I don't know.

Q. Do you recall whether it was between six and ten? [253]

A. Very, very likely. If I had the pay roll sheet I could tell.

Trial Examiner Myers: What pay roll sheet?

The Witness: The pay roll of the week they were laid off.

Mr. Orloff: That would be the week of February 7th.

The Witness: Yes.

Mr. Orloff: The witness has been handed General Counsel's Exhibit No. 18.

Mr. Garrett: Not at my request.

Trial Examiner Myers: At my request.

(Testimony of Richard Gildart.)

Will you give us the number of employees laid off?

The Witness: I am determining that by looking at it.

Q. (By Mr. Garrett): Have you got before you the pay roll list of February 7th? A. Yes.

Mr. Garrett: That is General Counsel's Exhibit No. 18, your Honor.

Trial Examiner Myers: I know that. I am asking him the number of employees that were laid off.

The Witness: From what I can gather, it is between seven and nine, or seven and eight.

Q. (By Mr. Garrett): Now, did you bring to that meeting the check list that you made in that book when you made your survey of the plant?

A. No, sir.

Q. Now, at this time, and on that pay roll list which you [254] have before you, which is the pay roll for February 7, 1951, the plant had in its employ various employees who were known as Mexican nationals, did it not?

A. They may have.

Q. By Mexican nationals you understand me to mean citizens of Mexico who are not citizens of this country? A. I understand.

Q. You understand that is the generally accepted meaning of the term, is that right?

A. That is right.

Q. And you and all the employees who have testified before you are bilingual, that is, you speak both English and Spanish? A. That is right.

(Testimony of Richard Gildart.)

Q. And I must say you speak English very correctly. A. Thank you, sir.

Q. Prior to the time of this meeting we are talking about, some question had arisen concerning the right of some of the Mexican national employees to be in this country under the immigration law, had it not? A. I believe it had, yes.

Q. The question had arisen as to whether some of them were "wetbacks"?

A. The question is——

Trial Examiner Myers: Will the reporter please read the question to the witness?

(Question read). [255]

The Witness: They might have been. There is no actual proof. I don't know.

Q. (By Mr. Garrett): That possibility existed when you went through the plant and made your survey as to whether the individual employees favored the AFL union or not, didn't it?

A. If that was the situation, that might have been.

Q. Did it not occur to you, Mr. Gildart, that when you made that survey it would probably come to the mind of some of the Mexican nationals that if they didn't give you the answer you wanted, they might be deported?

Mr. Orloff: I object to that as calling for a conclusion of the witness, as to what might have been in the other people's minds.

Mr. Garrett: Might the question be read before your Honor rules?

(Testimony of Richard Gildart.)

Trial Examiner Myers: I will sustain the objection. Reframe the question.

Q. (By Mr. Garrett): You asked these employees questions when you made your survey without consideration as to whether the employees you questioned were Mexican nationals or not, is that right? A. That is right.

Q. But you only questioned a part of the company's employees, you didn't question them all?

A. Only when the survey turned out to be a majority I quit [256] asking. I didn't take no man in particular.

Q. Mr. Baca is a relative of yours, isn't he?

A. Indirectly.

Q. By Marriage? A. By marriage.

Q. Anyway, you knew him outside of the job?

A. Just as an acquaintance.

Q. You knew he was a citizen and a war veteran? A. And so am I?

Q. You didn't ask him? A. No.

Q. Marquez is a citizen and a war veteran?

A. That is right.

Q. You didn't ask him?

A. I knew where he stood.

Q. Now, Mr. McKinzie in his testimony has mentioned rumors that the Mexican nationals working for the company were told that if they supported the AFL union they might be deported. Did they——

Mr. Orloff: I object to that.

Mr. Garrett: There is no question.

(Testimony of Richard Gildart.)

Mr. Orloff: Then I am going to object to the prelude of the question on the grounds that it states facts not in evidence.

Trial Examiner Myers: I never heard that before. [257]

Mr. Garrett: I think I should be allowed to place the question.

Trial Examiner Myers: Ordinarily, I would ask counsel to propound the question, but I never heard Mr. McKinzie so testify.

Q. (By Mr. Garrett): Did you hear any statements in the plant prior to the election that Mexican nationals who favored the AFL union might be deported?

A. I never heard no such statements.

Q. You made it a point to keep yourself conversant with the statements going around, with the rumors going through the plant?

A. As they got to me I kept myself——

Q. You knew that any Mexican nationals working for the plant who is in the country illegally would be in a delicate position in which he would be subject to deportation, did you not?

Mr. Orloff: I object to that as calling for a conclusion of the witness. This is a matter that might have been a question of legality, as to whether he could be deported, and certainly this witness would not know that.

Trial Examiner Myers: Overruled.

Will the reporter please read the question?

The Witness: If he was illegally in this country,

(Testimony of Richard Gildart.)

I might have known it, yes. I have no proof. [258]

Q. (By Mr. Garrett): Now, you had your second conversation with Baca out by the machine shop, out by the bulletin board. Did you ask him if he was still for the union?

A. I don't remember whether I did or not.

Q. Anyhow, he gave you an answer from which you couldn't tell whether he was for the union, is that right? A. That is right.

Q. He spoke of a lot of employees changing their minds, is that right? A. Right.

Q. Now, between your first and second conversations with Baca, had there been some rumors about possible deportation circulated around the plant?

A. Not to my knowledge.

Q. You didn't hear anything said?

A. It wouldn't concern me. If I had heard them, I wouldn't even given them a thought.

Q. You wouldn't consider it important whether or not rumors circulated that these nationals might be deported?

A. I don't draw conclusions from any rumors I hear.

Q. You consider that would be none of your business? A. That is right.

Q. And if they wanted to get illegal entry into this country and be deported, that would be their business, is that right? [259]

A. That is right.

Q. Now, between the time of your first and second talk with Baca, had you been talking to th em-

(Testimony of Richard Gildart.)

ployees about the possibility of getting a bonus system?

A. That statement could be drawn out. I talked numerous times on numerous occasions with a lot of people.

Q. Between your two talks with Baca you talked to Maldonado about it?

A. Oh, yes, I talked to Maldonado many times.

Q. And Telke? A. Yes.

Q. You don't know who they talked to?

A. No.

Q. But they talked to you, they knew you were the superintendent, is that right?

A. Right.

Q. And you said it was your plan, is that right?

A. Right. I would like to change that statement as to not my plan.

Q. It had originally been evolved by your predecessor?

Trial Examiner Myers: What do you want to call it?

The Witness: My suggestion to the group that could put it through.

Trial Examiner Myers: You mean your suggested plan?

The Witness: That is right. [260]

Q. (By Mr. Garrett): In your mind the bonus was tied up with this company representation system, is that right? A. That is right.

Q. Although in your first conversation had with Mr. Kiser after he came back after his illness, you

(Testimony of Richard Gildart.)

talked about the representation system rather than the bonus, is that right?

A. Well, it was both.

Trial Examiner Myers: What do you mean "both"?

The Witness: The representation system and the bonus system tied in together as one. It was right along with the two.

Trial Examiner Myers: Go ahead, Mr. Garrett.

Q. (By Mr. Garrett): You mentioned yesterday one speech at which you gave the listeners some help by translating. Who was that speech by?

A. Will you repeat that, please?

Trial Examiner Myers: Will the reporter please read the question to the witness?

(Question read.)

The Witness: Yes, that was a speech by me.

Q. (By Mr. Garrett): You gave it in English and then in Spanish?

A. I gave it in English and then in Spanish.

Q. That was the first speech to the employees' representation group? [261]

A. No, that was a speech in conjunction with the men that were laid off.

Trial Examiner Myers: Was that a speech to the employees then, the one at which you spoke in English and then translated to the whole group?

The Witness: Yes, the whole employees.

Q. (By Mr. Garrett): Was that before or after the second meeting of the employees' representatives? A. I don't remember.

(Testimony of Richard Gildart.)

Q. About the same time as the second meeting, was it?

A. It was afterwards. How long afterwards I don't know.

Trial Examiner Myers: Was it before or after?

The Witness: It was right following that, naturally, sure.

Mr. Orloff: Mr. Gildart, he asked you if it was before or after the second meeting with the representatives. You are saying it was right after.

The Witness: It was after the meeting that we discussed——

Q. (By Trial Examiner Myers): You only had one meeting with the representatives?

A. That is right.

Q. Was it before or after the election? The election was on February 23rd, the election conducted by the board. A. It was before the election.

Q. Was it before or after the first speech of Mr. Rehrig? [262]

A. The first speech—heck, I don't know whether it was before or after.

Q. Was it before or after the second speech?

A. I think it was before the first speech.

Q. Before the first speech of Mr Rehrig?

A. Right.

Q. Was it before the men were laid off or after the men were laid off?

A. That I discussed it with the employees?

Q. Yes, all of the employees.

A. I believe it was before the layoff. I believe the

(Testimony of Richard Gildart.)

employees laid off were there. I am not sure. I believe they were there, and the purpose was to tell them while they were there.

Q. Was any other representative of management present when you made this speech?

A. I don't think so.

Q. Did any of the employees ask you any questions as to what Mr. Rehrig said in regard to his two speeches? A. Yes, numerous of them.

Q. Did any of them ask you to translate what he said into Spanish?

A. A lot of them asked me. Not directly at the time of the speech, but after a time lapse. One of them could have asked me right afterward and another one the next day.

Q. At the time immediately after the speech?

A. I took no group of the men and presented myself to translating anything. If anything was translated, it would be at the request of somebody asking me.

Q. Immediately after the speech?

A. Very possibly.

Q. With respect to both speeches before the election?

A. No, it was probably in reference to one.

Q. Which one?

A. Possibly the second one.

Q. You mean most likely the second speech?

A. Pardon me?

Q. You mean your present recollection is that you talked to the employees in Spanish and told

(Testimony of Richard Gildart.)

them in Spanish what Mr. Rehrig said in English immediately after the speech?

A. No employees, maybe one that would ask.

Q. Whoever asked you, asked you at the time or immediately after Mr. Rehrig had finished with his second speech? A. After the speech.

Q. The second speech?

A. Well, it might have been on any speech because they were always asking me.

Trial Examiner Myers: All right, go ahead.

Q. (By Mr. Garrett): At the time of this first meeting of the department representatives in Mr. Rehrig's office, it was right after the conclusion of the first shift in point of [264] time, correct?

A. Yes.

Q. How were they called to Mr. Rehrig's office?

A. We either, by word, knew about going up there earlier, or we gathered at the end of the day and went up there. I don't know exactly. I think it was probably by word during the day.

Q. Did you set the time?

A. No, there was no time set. It was just after the shift.

Q. Who sent out the word that the meeting would be held? A. Probably me.

Q. Now, at the conclusion of that meeting were arrangements made for another meeting of that group?

A. There possibly would have except that the interference of the union activities distorted it quite a bit.

(Testimony of Richard Gildart.)

Q. Anyway, there were some arrangements made for continuing the organization of these department representatives?

A. We were going to continue the work, absolutely.

Q. It was understood there would be further meetings, but the exact time was not fixed, is that right? A. That is right.

Q. Shortly after that there was a meeting, at which you made the speech in English and Spanish?

A. Whether it was shortly afterwards, I wouldn't know.

Q. It wasn't the same day? [265]

A. It may have been or may not. It was shortly afterward.

Q. It was after February 7? A. Yes.

Q. And it was before the election?

A. Yes.

Q. Now, you made that speech to the employees as a group, as a whole? A. That is right.

Q. Where did you stand when you talked? Was it near the production line?

A. No, in the yard, the back yard.

Q. Out in the open? A. Out in the open.

Q. Was it at the time of the morning break or at the conclusion of the day shift?

A. I believe it was in the afternoon.

Q. Between 3:15 and 4:00 o'clock?

A. No, it was in the afternoon. It might have been 2:30, I am not exactly sure. That is a break.

Q. That is a break, too? The afternoon break?

(Testimony of Richard Gildart.)

A. I am not sure, but I believe that was it.

Q. How were the employees gathered to listen to you on that occasion?

A. They were gathered around in a half-circle, you might say.

Trial Examiner Myers: He means did you call them together [266] or did they just walk up to you?

The Witness: They just gathered.

Trial Examiner Myers: Did they know you were going to make a speech?

The Witness: Yes.

Q. (By Mr. Garrett): At the time of the meeting of the department representatives, had you told them you were going to make this speech to the men?

A. I don't remember whether I did or not.

Q. All right, now, this speech you made in the back yard, you told the assembled employees that you were going to make these layoffs?

A. Yes.

Q. And I presume you told them the reasons which you desired to impart to them for your taking this action? A. That is right.

Q. Did you tell them you had taken the matter up with the department representatives and had their approval?

A. No. Well, no, I don't believe so.

Q. In your speech did you mention this meeting of the department representatives in the office of Mr. Rehrig? A. No, I don't believe I did.

(Testimony of Richard Gildart.)

Q. Then, in your speech did you mention a possibility that a bonus plan could be worked out?

A. I don't believe I did. [267]

Q. In your speech did you mention the work that was being done towards the formation of a union to be formed exclusively of Rehrig employees?

A. I might have mentioned something, I don't know. The main purpose of the speech was for the lay off.

Q. When you finished this speech all the men who had listened to you knew that some six or eight employees were to be immediately laid off?

A. That is right, I read their names.

Mr. Orloff: Just a minute. I object to that as calling for a conclusion of the witness as to what the other employees knew.

Mr. Garrett: I will agree that the form of the question is objectionable and I ask leave to withdraw it.

Trial Examiner Myers: Very well.

Q. (By Mr. Garrett): Did you tell the employees in this speech that you were going to lay off certain employees? A. Yes.

Q. Did you name them by name?

A. I believe I did.

Q. Did you tell the employees in this speech that no other employees other than those you named were to be laid off? Do you remember making any such statement? A. No, I don't remember.

Q. You made no such statement? [268]

A. I don't remember whether I did or not.

(Testimony of Richard Gildart.)

Q. As a matter of fact, at that time you did intend to make further layoffs, I understand?

Mr. Orloff: I object to what Mr. Garrett understands. He is the only one who does know about it.

Trial Examiner Myers: Overruled. You may answer.

The Witness: I wouldn't be too sure about that.

Q. (By Mr. Garrett): As a matter of fact, you did, subsequently, lay off other employees other than those you named in this speech?

A. After that—there were some later, yes.

Q Some other layoffs?

A. Yes.

Q. So far as you were concerned, you left the way open to make further layoffs?

A. Other layoffs according to a man's termination and according to a man being fired for a reason that had nothing to do with the layoffs.

Q. You made these layoffs of the men you named for reasons which appeared good and sufficient to you, is that right? A. Yes.

Trial Examiner Myers: Why did you lay off these men?

The Witness: We had a superfluous amount of men.

Trial Examiner Myers: For economic reasons?

The Witness: Oh, yes. [269]

Mr. Orloff: May I ask if you have reference to the seven or eight men we are talking about that were discussed at this meeting?

The Witness: Yes.

(Testimony of Richard Gildart.)

Mr. Garrett: You ask that question of the Examiner, he asked the question.

Mr. Orloff: That was for the seven or eight men?

Trial Examiner Myers: That is the only layoff I know of in this record.

Mr. Orloff: Mr. Garrett was asking other questions about people who were terminated and I wanted to make sure the witness was answering the proper question.

Q. (By Mr. Garrett): After the speech, the seven or eight men were laid off?

A. I believe they were.

Q. They were named in the speech?

A. Yes.

Q. They were either laid off immediately or had been laid off already? A. Yes.

Q. And they were laid off for reasons which seemed good to you?

A. That is right, they were.

Q. And others were laid off later whose names you had not named in your speech, is that right?

A. That is right.

Q. Do you know Joe Perales? A. Yes.

Q. Did he ever complain to you that anyone forced him to sign a union card?

A. No, sir, he didn't complain.

Q. I think it was assumed in one of the questions the Examiner asked you that there was not a second meeting of this department representatives group after this first meeting, but before the election. Is it or is it not a fact that the representatives

(Testimony of Richard Gildart.)

had another meeting, a second meeting after the first meeting you have testified to, but before the election?

A. We might have, but I surely don't remember.

Q. I meant to ask you, Mr. Gildart, do you have available at the present time the book in which you entered the employees' names at the time you made the survey? A. No, sir.

Q. Has anyone ever asked you for that book since you made the survey? A. No, sir.

Q. Did you keep it in your possession or did you turn it over to someone else?

A. No, sir, I didn't keep it. I really don't know where it is.

Q. You didn't turn it over to anyone else? [271]

A. No, sir.

Q. So far as you know it is still in your possession or where you put it?

A. So far as I know, I don't know where it is. It might be in the trash can for all I know.

Q. Do you remember throwing it away?

A. I don't remember what I did with it. I know it is mislaid or the page is torn out.

Q. Have you looked for it recently?

A. No, sir.

Q. Do you remember telling Mr. Valverde, who testified here yesterday, that if the company was asked to live up to the union rates, the company would not be able to do it and might have to cut work down to two days a week?

A. I don't remember. I might have.

(Testimony of Richard Gildart.)

Q. Going back again briefly to Mr. Rehrig's speech the day before the election, do you remember Mr. Rehrig stating in the speech, suggesting to the employees that they get together and contact either Mr. Kiser or yourself in connection with the formation of an inside union?

A. I believe he mentioned something like that, yes.

Trial Examiner Myers: What is your best recollection?

The Witness: Well, that it was mentioned.

Trial Examiner Myers: By Mr. Rehrig?

The Witness: Yes. [272]

Trial Examiner Myers: In the course of his speech?

The Witness: Yes, it was that speech, yes.

Trial Examiner Myers: Go ahead, Mr. Garrett.

Mr. Garrett: Just a moment, please.

Trial Examiner Myers: Do you wish a few moments to go over your notes?

Mr. Garrett: Thank you.

Trial Examiner Myers: We will have a short recess.

(Short recess.)

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. Orloff: We are ready.

Mr. Garrett: Yes, I am ready.

Mr. O'Brien: We are ready.

Trial Examiner Myers: You may proceed with further examination, Mr. Garrett.

(Testimony of Richard Gildart.)

Q. (By Mr. Garrett): I show you General Counsel's Exhibit No. 7, an agreement for an election signed by B. H. Rehrig, dated February 13, 1951.

I ask you if you learned on or about that date that there would be an election held among the employees?

A. The exact date I would not know, but it might have been.

Q. Did you hear about the execution of this consent agreement I am showing you now from anyone?

A. I think I heard from someone, yes. From who, I don't remember. [273]

Q. After the meeting at which you spoke to the employees in two languages about the layoffs, were there any further meetings of the employees at which you spoke about contemplated layoffs or discharges?

A. No.

Q. Prior to that meeting at which you spoke to the employees in two languages, had there ever been any meeting at which the employees were gathered together to be informed of the contemplated layoffs or discharges, if you know?

A. No, I don't believe so.

Q. Now, with respect to this department representatives group, you testified that to your knowledge it had no further meetings after that first one in Mr. Rehrig's office, between that meeting and the time of the election.

(Testimony of Richard Gildart.)

Did you hold any meetings following the election?

A. I don't believe so. We might have.

Q. Do you recall any meetings following the election that were held either by the department representatives or by anyone else in connection with furthering this employees' representation plan?

A. There might have been some informal meetings. The exact presence or members, it would be hard to tell. The thing was pretty well distorted after the first meeting.

Q. What do you mean by distorted?

A. Confused, I believe. [274]

Q. The company started paying the bonus on or about the middle of March, is that correct?

A. Whatever date the record shows.

Q. The bonus is being paid once monthly, I understand? A. That is right.

Q. On the payday that falls nearest the middle of the month? A. On the 15th, supposedly.

Q. Now, since that bonus has been paid, have you had knowledge of any meeting in or near the plant at which the employees have been gathered together?

A. Up to date?

Q. Up to date.

A. Yes, I believe there was one.

Q. Will you tell me about when it was? I don't care how remote or how recent.

A. It was a gathering for explanation of money to be raised for this lawyer.

(Testimony of Richard Gildart.)

Trial Examiner Myers: What lawyer, this lawyer?

The Witness: No, this fellow Mr. Gorman.

Q. (By Mr. Garrett): Was that last week?

A. It was right before the notice was placed on the board.

Q. That would be a week before last, let the record show.

Since your speech in which you spoke about the contemplated layoffs or discharges in two languages, have you made any speeches since then?

A. I don't believe so.

Q. Have you made any speeches since then to all the employees? A. I don't believe so.

Q. Have you made any speeches since then to groups of employees?

A. Nor to groups. Any discussions we had would be with individuals asking me particular questions.

Q. Have there been any speeches, as far as you know, by Bud Rehrig at which he talked to all of the employees?

A. I don't believe so.

Q. Do you know of any speeches in which Mr. Rehrig has talked to certain groups of employees?

A. The only group I can remember is the same group that was up in Bud Rehrig's office.

Q. That group met subsequent to the election?

A. I talked with many groups in regard to business, but it has nothing whatsoever to do with making a speech.

Q. The only group that Mr. Rehrig has talked

(Testimony of Richard Gildart.)

to, so far as you know, is the group of department representatives which you have described before?

A. He didn't talk to that group.

Q. How about Mr. Kiser?

A. He was in the adjoining office. He might have stepped in for a second, that I don't clearly remember, but he was in the adjoining office. [276]

Q. With respect to that group of department representatives, since that time have there been any conferences between that department representative group and Mr. Rehrig?

Mr. Orloff: If you know.

Q. (By Mr. Garrett): If you know.

A. I don't know.

Q. Certainly there have been no such conferences at which you have been present?

A. No, sir.

Q. At which Mr. Rehrig was present?

A. No, sir.

Q. Have there been any conferences at which you have been present since the election at which the department representatives and Mr. Kiser have been present? A. I don't believe so.

Q. Now, this meeting week before last, where was it held? A. In the yard.

Q. In the back? A. Yes.

Q. I just want to ask you a question about that. The building in which the company's operations are housed is a large building that fronts directly on the street? A. That is right.

Q. There is no sidewalk in front, just the street?

(Testimony of Richard Gildart.)

A. That is right. [277]

Q. Down along the side of this building there are no driveways to get to the rear of the building, you go through the building itself?

A. No, sir, there is a driveway.

Q. Where does the driveway cut off from the street through the building?

A. It runs into the street the full length of the building on the east side and into the back yard.

Q. Into the back yard? A. Right.

Q. There is also a driveway directly through the center of the building, is there not? A. No.

Q. You can drive trucks through that from front to rear?

A. You can drive a lift truck through, but you couldn't get a truck through there.

Q. You could drive a small pickup truck directly from front to rear?

A. It is possible, yes.

Q. Prior to the time that the union organizers started working there, at the time of the noonday meal, a wagon used to come out and stop in front so that the employees could buy food and coffee there on the street in front of the building, is that correct? A. That is right. [278]

Q. Is it not a fact that about a week before the election that that wagon on the noonday period started driving to the rear of the building and the employees bought their things from the wagon in the rear of the building?

A. Whatever the lunch man did is his business.

(Testimony of Richard Gildart.)

Q. That is true. We will certainly stipulate to that. But what I am asking you to do is answer the question.

Is it not a fact that the lunch wagon which up to that time had been stationed at noon hours in front of the building, starting about a week before the election, was stationed at the rear of the building? A. It might have been.

Q. It is a fact?

A. It might have been, I don't keep track of them.

Q. You were there at the time every day?

A. I very seldom eat lunch.

Q. You were alert as to what was going on?

A. I keep no track of the lunch man.

Q. Didn't the lunch wagon drive right through the building when it started dispensing its food at the rear of the building?

A. No, sir, it drove through the driveway, it would have to.

Q. Alongside the building?

A. It would have to.

Q. There is a wire fence from the building and along the company property to the east, is there not? [279]

A. That is right.

Q. And also to the west?

A. That is right.

Q. And that wire fence is about how high?

A. You might say six foot.

Q. On both sides of it?

(Testimony of Richard Gildart.)

A. On the east side there is a building that serves as a fence.

Q. You say on the east side there is a building that serves as a fence?

A. Yes, the Signal Trucking Company.

Q. The driveway is to the rear on the east side?

A. The driveway is between the buildings.

Q. Between the buildings, but the driveway is on Rehrig's property? A. That is right.

Q. There is a gate in that fence between the Signal Trucking Company and the Rehrig property?

A. That is right.

Q. That gate is customarily kept closed or locked? A. No, sir.

Q. Customarily kept open?

A. It is always open except in the evenings.

Q. In reaching the rear of the building, the lunch wagon went through the gate and down the driveway to the rear? [280]

A. Possibly, yes, if he did.

Q. He had to go that way or through the building itself?

A. He had to go that way.

Q. There is no other access to the rear of the property, is that right? A. No, sir.

Q. About a week before the election did you have any talk with the driver of the lunch wagon?

A. No, sir.

Q. About taking his outfit to the rear?

A. No, sir, I have nothing to do with where he takes his truck.

(Testimony of Richard Gildart.)

Q. Until he started taking his truck to the rear —is it a truck or a wagon?

A. It is a built-up truck.

Q. It is small enough so it could either go down the driveway or through the building?

Mr. Orloff: I object as calling for a conclusion of the witness as to whether this truck was small enough to go through the building.

Trial Examiner Myers: Overruled.

The Witness: No, not through the building.

Q. (By Mr. Garrett): You say it couldn't go through the building. Do you mean it would be physically impossible to take it through the building? [281]

A. It could not get out at the back end, there is a dock there. It would have to drive off the dock.

Q. Is the dock straight across the entire rear of the building?

A. There is no outlet on the entire rear of the building, except where the dock is, where you can drive out.

Q. So the large rear doorway of the building opens on the loading dock? A. That is right.

Q. Before they started taking the wagon to the rear the employees customarily gathered around the wagon at the noon hour in the public street, did they not? A. I believe so.

Q. And after they started taking the wagon to the rear, the employees customarily gathered around the wagon on the private property of the Rehrig company? A. I suppose so, if that was it.

(Testimony of Richard Gildart.)

Q. Now, what time of day was this meeting the week before last?

A. It was right after 3:30.

Q. At the close of the day shift?

A. Yes.

Q. Was it held on the building dock or to the rear of the loading dock?

A. Right off to the side of the loading dock. [282]

Q. Who spoke first? Do you recall who was the first man to speak?

A. I spoke up in regard to what the purpose of the thing was for.

Q. And at that time, the time that the meeting started, were there any notices on the bulletin board out in the machine shop that you recall?

A. No, sir.

Q. The board was blank at that time as you recall? A. That is right, sir.

Q. Will you tell us, in substance, what you said?

A. Yes. I said the situation was getting to a point where it had to go one way or the other. It didn't make any difference to me which way it went, all I wanted to know was that there was half a chance, and I didn't mean a handful of men, it had to be an overwhelming majority.

Then the employees could get together and hire a lawyer, if they wanted to. The only determination of how that would be handled would be for each employee—there was a bunch of scratch paper on the board. We were to get the scratch paper and they were to write a U or C, which meant com-

(Testimony of Richard Gildart.)

pany, which is really not proper, but that is the way we put it, and then drop these into the box.

It didn't make any difference who wrote nothing, who wrote U or who wrote C, it would get some sort of knowledge of what [283] was in mind and what was worth working on. From the determination of that, it appeared overwhelmingly——

Q. Just a second. I am going to give you an opportunity to tell us the result of the count. I want you to very carefully try to think whether you have told me all you said on the occasion of your first address to the assembled employees.

Think back. Is that all you told them or did you tell them anything in addition to that? Did you make any reference in your first speech——

A. Yes, I asked——

Q. ——to the fact there was a Board case pending?

A. No, I said I wasn't going to say very much; that that was all I was going to say and that Mr. Howard Telke was going to explain anything further.

Q. I just wanted to be sure that we got everything that was said. I asked you if you made any reference to the pending Board case and you said no, is that right? A. What Board case?

Q. The one we are on now.

A. No, it was merely on the count.

Q. You merely talked about the count on the employees' preferences?

Trial Examiner Myers: When was this meeting?

(Testimony of Richard Gildart.)

The Witness: A week before last.

Q. (By Mr. Garrett): This preference as to U or C? [284] A. That is right.

Q. Union or Company? A. That is right.

Q. And you didn't in your opening speech make any reference to Mr. Gorman, I take it?

A. No, sir.

Q. Or to the question of collecting attorney's fees at all? A. No, sir.

Q. And you didn't make any reference to the employees representation plan in your speech, in your opening speech? A. No.

Q. Did you make any reference in your opening speech to the department representatives? Did you tell the men they would hear from the department representatives?

A. Let me clarify that. You want to remember at that point that this thing is so upset and so mixed up in everybody's mind that we just had to start from scratch and determine whether it was worth while getting a lawyer.

Q. Well, that is true. I know what you think and what you said are distinct things and the one helps you with the other.

Now, bearing that in mind, can you think back and say whether you said in your opening speech to these men, no matter what you had in your mind, can you tell me whether you said anything about whether it might be necessary to get a lawyer or whether you made any mention of a lawyer? [285]

A. I don't remember.

(Testimony of Richard Gildart.)

Q. You don't remember. Now, we will go back to my other question.

Did you, in your opening speech to these men a week before last, make any reference to the department representatives that had been selected at your suggestion back in February, by telling the men they would hear from the department representatives they had elected?

A. Let me come to the point of clarifying that, again.

At that February point——

Q. Some of these men are gone?

A. Coffey and Baca.

Q. The others are still employees?

A. Yes, and it had to be done over again.

Q. When was it done over again?

A. I don't remember.

Q. Was it nearer the time of election or nearer to the present time?

A. It was away after the election.

Q. Who are the representatives?

Trial Examiner Myers: Were the same men elected as before?

The Witness: No. Most of them were re-elected to form this group of ours. We were still slowly going ahead with this group of ours.

Q. (By Mr. Garrett): So you still had Maldonado? [286]

A. Maldonado, yes, he was elected president.

Q. And you still had Telke?

A. No, Telke wasn't elected.

(Testimony of Richard Gildart.)

Q. And, of course, Coffey and Baca were out?

A. That is right.

Q. Now, going back to the other group you had —Marquez, I suppose he was out?

A. Yes.

Q. And you were still in the group?

A. Yes.

Mr. Orloff: Objected to as assuming a fact not in evidence that he was ever in the group. He was never in the group and never so testified.

Trial Examiner Myers: I sustain the objection.

Q. (By Mr. Garrett): Carlos Taylor, who was with Baca for the line, was he re-elected?

A. Yes.

Q. So as a result of these new elections, you had Maldonado, who was from the metal department and who was also president, is that right?

A. That is right.

Q. Was there any secretary elected?

A. Yes.

Q. Were you elected to any office?

A. I think I was finally elected to treasurer.

Q. So I will put down here Gildart, treasurer. Was Taylor elected to any office?

A. Secretary.

Q. He was elected secretary and he was from the line?

A. This group wasn't complete, we didn't go ahead with committee members.

Q. Who was selected in Telke's place for the machine shop?

(Testimony of Richard Gildart.)

Mr. Orloff: Objected to as assuming something not in evidence.

Q. (By Mr. Garrett): Who was elected, if anybody, in Mr. Telke's place?

A. Nobody in his place.

Q. Who was elected from the staff of the machine shop, if anybody?

A. There were no particular departments. They were members of the group.

Q. So we have Maldonado, Gildart, Carlos Taylor—who were the other representatives?

A. There was one more, Edward Hinojosa.

Q. Now, where does Hinojosa work?

A. He works on the line.

Q. So I presume then in this opening speech you made to this group a week before last you told them they would hear from the other members of the staff after you had spoken, is that right? [288]

Mr. Orloff: I object to that. What Mr. Garrett presumes is not part of the evidence.

Trial Examiner Myers: Reframe your question and leave out that phrase.

Q. (By Mr. Garrett): Did you mention in your opening speech the other members of the representation group? A. No, I don't believe I did.

Q. Do you remember whether you told the audience they would hear from some of the other representatives after you ceased talking or had sat down?

A. Well, not one of the representatives, but I told them they would hear from Mr. Telke.

(Testimony of Richard Gildart.)

Q. Did you remind them that Mr. Telke was an elected representative? A. No, he wasn't.

Q. Did you tell them that Mr. Telke or some of the speakers who followed you would go into the question of an attorney?

A. I told them Mr. Telke took it upon himself to go down——

Q. And see a lawyer?

A. Yes, and it was up to him to explain it to them.

Q. At the time you made this speech we are referring to, Mr. Telke had already seen the lawyer, is that right?

A. I don't know. You will have to ask Mr. Telke.

Q. Was the lawyer that Mr. Telke saw Mr. Gorman?

A. I don't know. You will have to ask Mr. Telke.

Q. Did Mr. Telke make any report to the representatives after he went down to see the lawyer?

A. You will have to ask Mr. Telke.

Q. All right. Specifically, did you learn, after Mr. Telke went to see the lawyer, what it would cost to have the lawyer? Did you know anything about the cost prior to this meeting a week before last? A. Yes, I believe I saw it on the board.

Q. You had gotten it from somebody or through the bulletin board, is that right?

A. It was from the bulletin board.

Q. Did you say, "I believe I saw it on the bulletin board"? A. That is right.

Q. There apparently had been posted some in-

(Testimony of Richard Gildart.)

formation concerning a lawyer on the bulletin board prior to the date of this meeting?

A. No. This was after the meeting. I didn't know what it was going to cost for a lawyer before the meeting. I had no knowledge of anything of that sort.

Q. I understand. In this representation group you say Mr. Carlos Taylor was elected secretary, is that right? A. That is right.

Q. This second election at which representatives were voted on, again, did you send out the word on that? A. I believe I did. [290]

Q. And how was that word sent out? Was it sent out in the form of a writing or did you send it out from man to man the way you had formerly done?

A. About the same way.

Q. Was the voting in the departments or was the voting among all the employees?

A. The voting was the total of the employees all at once.

Q. Did they vote for representatives or did they vote for particular officers?

A. They voted for the particular officers in forming the first part of this group, in which somebody had to represent the money that was being put in the bank account. To start off, we had to start it.

Q. Were the employees told of this purpose at a formal meeting?

A. I believe it was explained to them at the time of the voting.

Q. They voted at one time?

(Testimony of Richard Gildart.)

A. It was also written on the blackboard to explain to them why we had to have four men. In the future, in case we ever straightened it out, so that loans would be possible, it would have to be signed by three of the four men.

Q. Do you mean loans to employees?

A. That is right.

Q. Out of the bonus money that was accumulated in the bank [291] account under the bonus plan?

A. If the plan was agreed upon, the final dealing with the group and between the employees, if that is what it was going to turn out to be.

Q. Since the middle of March the employees had been getting the direct bonus payment the middle of each month?

A. That is according to the records, yes.

Q. Since the middle of March the company has been making deposits of the balance of the one-fourth of its net earnings in the bank?

A. Yes.

Q. According to the original plan, is that right?

A. That is right.

Q. And in this meeting the employees were told, and it was also posted on the bulletin board, that they were going to vote on officers who would have something to do with the administration of this money in the bank?

A. That is right.

Q. When the meeting was called, who made this explanation to the men?

(Testimony of Richard Gildart.)

A. Part of it was probably myself and part of it was on the board.

Q. Who put the explanation on the board which appeared there? A. I believe I did.

Q. Did Mr. Kiser discuss or speak at that meeting? [292] A. No, sir.

Q. Or Mr. Rehrig?

A. No, sir. They weren't around.

Q. At that meeting did you discuss with either one of them what you were to place on the board?

A. No, sir.

Q. Did the matter on the board refer to a bonus or did it also refer to the employees representation plan in the interest of the bonus?

A. They knew about the bonus. This was merely to progress on the money that was being put in the bank.

Q. These officers had something to do with the money in the bank? A. That is right.

Q. Did the notice on the board advise the employees that these officers would also have something to do with the representation plan by which employees would be represented in an organization to bargain for them?

A. That is right, according to whatever they agreed upon on the final completion of it.

Q. Where was the meeting held, what part of the plant?

A. Along the assembly line, the same location. They seemed to be held in the same location, more or less.

(Testimony of Richard Gildart.)

Q. This meeting was held within this month, that is, since the first of this month? It is now the 28th or 29th. [293]

A. That meeting was held—that is one date I can't remember.

Q. How long before the meeting the week before last was the meeting that they voted on the president, treasurer, secretary and so forth?

A. How long before?

Q. Yes.

A. Quite a while.

Q. The meeting on the lawyer was the week before last? A. That is right.

Q. How long before that was this meeting where the vote was taken?

A. That was right after the first—it was shortly after the first amount of money was deposited in the bank, which would make it possibly in March.

Q. Did the plant close down on the Fourth of July? A. I think it did, I am not sure.

Q. Can you recall whether this meeting in which the officers were voted on was before or since the Fourth of July?

Mr. Orloff: I object to that. The witness has testified it was before July, and I think March comes before July in each year.

Trial Examiner Myers: The objection is sustained.

Q. (By Mr. Garrett): Was any written record made of this meeting? [294] A. No.

Q. Could the meeting have been held as late as

(Testimony of Richard Gildart.)

July, the meeting at which the secretary, treasurer and president were voted on?

A. I don't believe so.

Q. You believe it was before July?

A. I think so.

Q. Possibly as early as March?

A. That is right.

Q. After you spoke at that meeting and called attention to what was on the board—by the way, did you discuss what you were to put on the board with Mr. Kiser? A. No, sir.

Q. Or with Mr. Rehrig?

A. No, sir.

Q. Did others speak at that meeting?

A. I don't believe so.

Q. Did anyone at that meeting vote on anything except these officers?

A. Will you repeat that, please?

Q. Was any vote taken at that meeting except on officers? A. No, that is all.

Q. Was there any selection made among the employees as to who was to attend that meeting, or was it attended by all the employees? [295]

A. Attended by all.

Q. As to the meeting the week before last, who followed you in speaking at that meeting?

A. Mr. Telke.

Q. And were you present during all the time that he spoke? A. Yes.

Q. What did you hear him say?

A. I didn't pay any attention to it. He had

(Testimony of Richard Gildart.)

something to say to them and I didn't pay any attention to it.

Trial Examiner Myers: Where was the meeting?

The Witness: In the yard.

Trial Examiner Myers: What time was it?

The Witness: After 3:30, so that it would include the night shift.

Trial Examiner Myers: After the finish of the day shift, but before the start of the night shift?

The Witness: The night shift goes on when the day shift goes off.

Trial Examiner Myers: Were any of the night shift people there?

The Witness: Everybody was there.

Trial Examiner Myers: Was anyone docked for the time spent at this meeting?

The Witness: No, sir.

Q. (By Mr. Garrett): I take it Mr. Telke is here in the [296] hearing room? A. Yes.

Q. Did anyone else speak besides Mr. Telke?

A. No, sir.

Q. Just you and Mr. Telke?

A. That is right.

Q. Did Mr. Kiser know you were going to have this meeting prior to the time it started?

Mr. Orloff: If you know.

The Witness: I don't really know. I don't discuss everything I do with Mr. Kiser.

Q. (By Mr. Garrett): You would not have held the meeting without his approval?

A. Sure I would.

(Testimony of Richard Gildart.)

Q. Or without Mr. Rehrig's approval?

A. That is right.

Q. Your idea was that he had nothing to do with it, is that right? A. That is right.

Q. What didn't the meeting have anything to do with? A. With them, at the present time.

Q. It was none of Mr. Rehrig's business?

A. This was something between the employees.

Q. You figured it was none of Mr. Rehrig's business?

A. Right, as long as maybe he approved it later on, it is [297] all right.

Q. You would not have held the meeting without his approval?

Mr. Orloff: I object to that as being asked and answered. He just said it wasn't any of their business.

Trial Examiner Myers: The objection is sustained.

Q. (By Mr. Garrett): Did you talk to Mr. Rehrig about having the meeting before you held it?

A. No, sir.

Q. Did you talk to Mr. Kiser about having this meeting before you called it?

A. I might have mentioned it to him about having it or having an idea of electing officers. I didn't tell him when the meeting was to be held or why I was going to hold a meeting or anything else.

Q. You are talking about the meeting at which the officers were elected, is that it?

A. That is the one I mean.

(Testimony of Richard Gildart.)

Q. You are talking about the meeting which was held as early as March and possibly as late as July?

A. Yes, that is right.

Q. You are talking about that meeting?

A. Yes.

Q. That particular meeting you considered no particular affair of Mr. Rehrig's or Mr. Kiser's, but you discussed it with Mr. Kiser? [298]

A. Only after it had been completed and it was set up.

Q. I think you misunderstood me, Mr. Gildart. I am asking you about the meeting a week before last. Did you tell Mr. Rehrig you were going to have that meeting? A. No, sir, nobody.

Q. As to the meeting a week before last, did Mr. Rehrig know you were going to have that meeting before it took place? A. No, sir.

Q. As to the meeting a week before last, did you tell Mr. Kiser?

A. No, sir, Mr. Kiser wasn't even there. He wasn't even in town. He was somewhere in Newport Beach.

Q. Was Mr. Rehrig in the plant?

A. No, sir.

Q. He wasn't in the plant, either?

A. No, sir, he was in Arizona.

Q. You were in charge? A. That is right.

Q. After you and Mr. Telke spoke, were there any questions asked?

A. One question, I believe.

Q. Who by? A. One of the employees.

(Testimony of Richard Gildart.)

Q. What was the question?

A. It think it was about the balance that was in the bank. The [299] fellow didn't understand the balance.

Q. Now, what balance in the bank do you refer to?

A. I am referring to the balance of the group that was left after the $17.50 was paid out.

Q. I see. So all of this bonus money that wasn't paid in this monthly payment to the employees was under the control of this group, is that right?

A. That is right.

Q. That group was Maldonado, yourself, Taylor and Hinojosa?

A. That is right, but up to the point of any procedure, it had to be okayed. I understand the Government or some sort of organization, the Wages and Hours, or something of that sort, have rules on it.

Q. Did you tell the man what the balance was?

A. Yes, approximately.

Q. Was his question as to why some of this money couldn't be used to get a lawyer?

Mr. Orloff: I think we have gone pretty far afield.

Trial Examiner Myers: It is about time you objected.

Mr. Orloff: I gathered you were interested in getting some of this information, but we are getting further and further afield.

(Testimony of Richard Gildart.)

Trial Examiner Myers: I will sustain the objection.

Q. (By Mr. Garrett): Were there any votes taken at the meeting? [300]

Mr. Orloff: Objected to as being at a time long past.

Trial Examiner Myers: I will sustain the objection. We have already gone over that. I don't care about the meeting of a couple of weeks ago.

Mr. Garrett: I have a question before the witness. I presume there is an objection?

Trial Examiner Myers: I sustained the objection.

Q. (By Mr. Garrett): After the meeting was this matter written on the blackboard on Monday or was it done at some subsequent date?

Mr. Orloff: I object to that as being uncertain. What meeting do you have reference to?

Trial Examiner Myers: Do you mean the meeting of a week ago?

Mr. Garrett: Yes.

Trial Examiner Myers: Overruled. Will the reporter please read the question to the witness?

(Question read.)

The Witness: I believe it was on a Saturday.

Q. (By Mr. Garrett): Then the meeting was on a Friday?

A. It was a little late to write it up on Friday, as I recall.

Mr. Garrett: No further questions.

Q. (By Trial Examiner Myers): Did you ever

(Testimony of Richard Gildart.)

hear of the Rehrig Employees Benefit Group? [301]

A. Yes.

Q. When did you hear of it the first time?

A. That is the group that was formed.

Q. When?

A. At that time during March.

Q. March? A. Yes.

Q. Are you a member of that organization?

A. Yes.

Q. Do you hold any office in that organization?

A. Do I hold office? Yes, only through the will of the employees.

Q. What office?

A. Treasurer. I am supposed to deposit the money.

Q. Going back to this representation plan, do you know how the representatives were elected?

A. They were elected by vote.

Q. By raise of hands or written vote?

A. I don't know how they performed the particular election in their own departments. I had no knowledge.

Q. Did you know when the elections were held?

A. The day?

Q. Not the day but the hour of the day. Was it during working hours?

A. Yes, it was during working hours. [302]

Q. And were the elections held with your permission? A. Yes.

Q. And were any of the employees docked for any time they spent? A. I don't think so.

(Testimony of Richard Gildart.)

Q. You don't know whether it was by raise of the hand or by secret ballot?

A. No, sir, I don't know.

Q. How were you notified that certain persons were elected as representatives?

A. I believe the solution came out either from them or some of the employees. At any rate, I found out.

Q. That these four people were duly elected representatives, is that what you mean? A. Yes.

Q. Going to the speeches by Mr. Rehrig, did he have anything in writing before him when he made these two speeches before the election?

A. No, sir.

Q. You don't know if he read prepared speeches?

A. No, I don't believe he did.

Q. It is your best recollection that he did not read a prepared speech? A. No, sir.

Q. Do you know how this benefit association, called the [303] Rehrig Employees Benefit Association, came into existence? A. Yes.

Q. How?

A. It came into existence through a suggestion by me.

Q. When did you make that suggestion?

A. It was an idea that was formed much before March, but the March meeting was the start of it and somewhat the original officers were to be elected, but it was so vague at that time that we didn't forge ahead until the final officers of March.

Q. Is it fair to say that the representatives who

(Testimony of Richard Gildart.)

were elected in February formed the nucleus of this benefit group?

A. Yes, I would say that, sir.

Trial Examiner Myers: Any questions, Mr. Orloff?

Redirect Examination

Q. (By Mr. Orloff): Mr. Gildart, you had some questions propounded to you by Mr. Garrett relative to later layoffs. He referred to the layoffs later than the seven men we talked about when you looked at the February 7th payroll, where there were either seven or eight layoffs at that time.

When you spoke of some later layoffs, did you have reference to the persons who were named on the last page of General Counsel's Exhibit No. 4, which sheet is headed, "Men Appearing on February 14, 1951 List but not Eligible for February 23rd Voting"?

Did you have reference to these persons who had been laid [304] off when you were asked about that by Mr. Garrett?

A. No, these weren't the laid-off boys.

Q. These are not the seven or eight you talked about being laid off from the February 7th payroll?

A. No.

Q. Were any other people laid off after the seven? I believe you testified there were. Is this the group you have reference to?

A. That is right.

Q. Of this group there appears after each name a reason or some statement, such as "Left for an-

(Testimony of Richard Gildart.)

other job." Was that the reason his employment was terminated? A. Yes.

Q. I note you are listed on here as factory superintendent. That is merely a statement you were not eligible to vote, is that the purpose of that?

A. Yes.

Q. F. Ibarra was discharged. Do you know why he was discharged?

A. Yes, at this particular time he was creating a terrific lot of trouble among the men, and a few of the men were complaining, and I asked him once that during working hours he should mind his work and not try to start confusion among the men.

Q. He was discharged for cause? [305]

A. That is right.

Q. Lemas, it says, "Army." Did he leave Rehrig-Pacific voluntarily? A. Yes.

Q. Manuel Sambrano, did he leave Rehrig-Pacific Company voluntarily? A. Yes.

Q. Did he not just show up or what?

A. He left word through one of the other employees that he would not be back.

Q. Torres and Valencia, I assume these two just disappeared and never showed up again?

A. That is right.

Q. This was the group of employees who were on the payroll on the 14th of February, but who were not on the payroll on the 23rd of February, is that right? A. That is right.

Q. So that is the group that was eliminated from voting rights on the vote held by the National La-

(Testimony of Richard Gildart.)

bor Relations Board or under their supervision?

A. That is right.

Q. Mr. Garrett asked you whether or not you had any information or whether you heard any rumors of a possible deportation of anyone who might have been in this country illegally. Did you ever hear any rumors that the union threatened possible deportation [306] of anyone who didn't join the union?

A. Yes, there were rumors, but I don't particularly believe rumors.

Q. What you said before was if there were rumors or if anything was going on it was their own business. You felt that way whether it was the union who made the threat or whether it was somebody else? A. Absolutely.

Q. You made a reference to the speech of Mr. Rehrig's the day before the election and Mr. Garrett asked you if anything was said relative to inside unions along that line.

I believe your answer was to your best recollection that some reference was made to it. Can you recall what the reference was in regard to the inside union? A. By Mr. Rehrig, you mean?

Q. Yes. Do you recall, do you have any independent recollection of it?

A. He said something about this group that we had formed, that they could get in touch with me or Mr. Kiser to further the thing. As far as he was concerned, he had nothing to do with it, it was up to them.

(Testimony of Richard Gildart.)

Q. In other words, is that what you had reference to when you say that a reference was made to an inside union? That is the language you had reference to? A. Yes. [307]

Trial Examiner Myers: That group you just spoke about, is that the representation plan or the four representatives?

The Witness: Yes.

Trial Examiner Myers: That is what Mr. Rehrig referred to?

The Witness: It all depended — he probably meant the nucleus or the original, because at that time that group was not in process.

Trial Examiner Myers: Baca, Telke and the other two?

The Witness: Yes.

Mr. Orloff: For clarification, I believe there were more than four.

Q. (By Mr. Orloff): How many were in the group as a nucleus?

A. Coffey, Taylor, Baca and Marquez.

Q. Wasn't there also Maldonado? A. Yes.

Q. Then there were six in that group?

A. That is right.

Trial Examiner Myers: Two left sometime after the election and that left four.

The Witness: That is right.

Q. (By Mr. Orloff): There were four in the other election? A. That is correct.

Mr. Orloff: No further questions.

Trial Examiner Myers: Mr. O'Brien, do you have any further [308] questions?

Mr. O'Brien: Nothing further.

Trial Examiner Myers: Mr. Garrett, do you have anything further?

Mr. Garrett: Nothing further.

Trial Examiner Myers: You are excused.

(Witness excused.)

Trial Examiner Myers: We will now be adjourned until 1:30 p.m. this afternoon.

(Whereupon, a recess was taken until 1:30 o'clock p.m.) [309]

After Recess

(Whereupon the hearing was resumed, pursuant to the taking of the recess, at 1:30 o'clock p.m.)

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. O'Brien: We are ready.

Mr. Orloff: We are ready.

Trial Examiner Myers: Mr. Garrett, are you ready to proceed?

Mr. Garrett: We are ready.

Mr. O'Brien: Mr. Examiner, the testimony this morning, through Mr. Gildart, developed facts which were not known to me and not known to the General Counsel until the time Mr. Gildart was on the stand.

In the light of these facts, which I believe show that the Rehrig Employees Benefit Group was formed, assisted and dominated by the respondent employer.

The charging union filed an amendment to the

charge during the noon recess and I prepared an amendment to the complaint. I told Mr. Gorman, briefly, over the telephone that matters had come up this morning that seriously affected the interest of his client and I asked him to come over here.

I am now serving upon Mr. Maldonado, as president of the group, a copy of the original complaint and notice of hearing, a copy of the amended charge and a copy of the amendment to [310] the charge.

I also hand a copy, of course, to Mr. Orloff and Mr. Gorman, and suggest that we have a recess to permit them to examine these documents. Then I shall make a motion for leave to amend the complaint.

Trial Examiner Myers: I suggest you serve Mr. Garrett with a copy.

Mr. O'Brien: I shall do so.

Trial Examiner Myers: We will take a short recess.

(Short recess.)

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. O'Brien: We are ready.

Mr. Orloff: We are ready.

Mr. Gorman: Yes, we are ready.

Mr. Garrett: Yes, we are ready.

Mr. Gorman: I would like an opportunity to have some time for the purpose of making an objection to this amendment. I don't know whether I will have any or not. I want to check a little law and check the sufficiency of the complaint.

Trial Examiner Myers: Wait until I hear the motion to amend.

Mr. Gorman: I am sorry.

Mr. O'Brien: Mr. Examiner, I will ask the reporter to mark these documents for identification.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 20 and 21 for identification.)

Mr. O'Brien: Mr. Examiner, I have asked the reporter to mark as General Counsel's Exhibit No. 20 for identification an amended charge against the employer, filed at 1:45 p.m. today.

As General Counsel's Exhibit No. 21, an amendment to the complaint adding just two paragraphs:

"11. Rehrig Employees' Benefit Group is a labor organization within the meaning of Section 8(a)(5) of the Act."

Trial Examiner Myers: You said Section 8(a)(5). Do you mean Section 2.5 of the Act.

Mr. O'Brien: That is right, Section 2.5 of the Act.

Mr. Gorman: That is Section 25?

Trial Examiner Myers: Section 2, Subsection 5.

Mr. O'Brien: I am correcting that on the face of General Counsel's Exhibit No. 21 for identification.

Part 2 of the amendment to the complaint adds Paragraph 12, as follows:

"In February 1951 and March 1951, Respondent, through Richard Gildart, its factory superintendent, did cause to be formed a labor organization of its employees called Rehrig Employees' Benefit Group

and did then and thereafter, [312] to and including the date hereof, dominate and interfere with the formation and administration of said labor organization and contribute financial and other support thereto."

Paragraph 3 of the Amendment to the Complaint adds Paragraph 13, which is a conclusionary paragraph that the acts set forth in Paragraph 12 constitute a violation of Section 8(a), subsections (1) and (2) of the Act.

Paragraphs 4 and 5 of the Amendment to the Complaint refer to Paragraphs 9 and 10 of the original Complaint.

Paragraphs 4 and 5 being Amendments to other conclusionary paragraphs of the Complaint.

In the approximate ten years I have practiced before the National Labor Relations Board this is the first time I have had to make such an amendment. The original Complaint charges that the respondent interfered with the right of its employees by suggesting the formation of a company union.

It became apparent through the testimony of Mr. Gildart that that intention was fulfilled. So far as the General Counsel is concerned, I do not intend to offer any further testimony. I am resting the General Counsel's case for domination upon the testimony of Mr. Gildart yesterday afternoon and today.

I don't think the respondent is in any position to claim surprise because he was put on notice by the complaint of the [313] intention of its supervisors to form a company union and the evidence was all

adduced through the respondent's witness. It was not a General Counsel's witness, not a union witness, it was the respondent's witness.

Trial Examiner Myers: You say all the evidence so far adduced is going to be used for the purpose of showing domination?

Mr. O'Brien: Interference, support and domination, yes. From the state of the record, I do not believe it is necessary for the General Counsel to offer any further evidence.

Trial Examiner Myers: The formation also?

Mr. O'Brien: The formation, yes.

Trial Examiner Myers: In other words, you don't intend to offer any other evidence?

Mr. O'Brien: No further evidence.

Trial Examiner Myers: With respect to the 8 (a)(2) allegation of the Complaint?

Mr. O'Brien: Yes.

Trial Examiner Myers: Is that right?

Mr. O'Brien: That is right. However, we do have the problem of the Rehrig employees' benefit group.

You will remember that last Monday, through Mr. Gorman, this group moved for leave to intervene in this proceeding.

The General Counsel objected to the intervention and they were not permitted to intervene at that time, but counsel [314] was invited to remain and to participate in so far as his interest might appear.

Practically all of the evidence relating to the respondent company's interference, domination and support of the group was adduced in the absence

of Mr. Gorman. However, the evidence upon which I relied was adduced by the treasurer of the group and much of that in the presence of the president of the group.

If agreeable with Mr. Gorman, I would be glad to request the reporter to immediately type up that portion of the transcript and make it available to him under the daily copy clause of the Board's contract with the reporter.

Trial Examiner Myers: You mean at the Board's expense?

Mr. O'Brien: Yes, or at the expense of General Counsel, whichever it may be. I realize the inconvenience to counsel and would do anything in my power to assist or accommodate my schedule to his in any way that I can, and at the same time I do want a prompt determination of this case.

I have served upon Mr. Maldonado, president of the Association, a copy of the Amendment to the Charge and the Amendment to the Complaint.

Trial Examiner Myers: How about the original?

Mr. O'Brien: I also served a copy of the original on Mr. Maldonado.

Trial Examiner Myers: How about the original Charge? [315]

Mr. O'Brien: The original Charge, I am not sure. If I have not, we will do so immediately.

Trial Examiner Myers: What is your position, Mr. Orloff?

Mr. Orloff: The Amendment states a new cause of complaint. One that is not contained in the Com-

plaint, and as far as I am concerned, I would desire the time necessary to analyze it and determine what procedure or proceeding I desire to take in connection with it. The matter is not a cause that was set forth in the original Complaint. I believe there were two causes in the original Complaint, violation of Subsections (1) and (5).

This is a new cause and I am not prepared to state at this time, without further study, what my position might be in connection with it.

I request a continuance of the matter so that ample time can be had to reply to this Amendment to the Complaint, the same as though it was an original complaint, as though it was a new cause of action.

Trial Examiner Myers: What would you consider necessary?

Mr. Orloff: Well, I merely consider it the same as any other filing of a new complaint and I believe we are usually entitled to ten days to reply to a complaint.

In this particular instance, as I have already advised the Court, I expect to go to trial on a jury case on the 4th of September and that case will probably last, I am estimating, [316] about three days, as I said the other day. I don't believe that ten days within which to answer this amendment is excessive under the circumstances.

Trial Examiner Myers: What is your position, Mr. Gorman?

First of all, are you appearing now for the Rehrig employees officially?

Mr. Gorman: Yes.

Trial Examiner Myers: Will you kindly state your appearance for the record?

Mr. Gorman: A special appearance by Edward I. Gorman, Room 920, 610 South Broadway.

Trial Examiner Myers: What is the special appearance?

Mr. Gorman: That is in response to a request by Mr. O'Brien to appear at this time, as I understand it, for a conference and a possible amendment of the Complaint to bring our group into it.

The reason for the special appearance is because I don't think I want to enter an official appearance at this time. I don't know, I have not made up my mind, and would like to avail myself of an opportunity to check the sufficiency of the Complaint.

Trial Examiner Myers: How long will it take you to make up your mind whether you want to appear for this group?

Mr. Gorman: I would like to discuss the matter with the group and an opportunity to check the law and perhaps file [317] any proper motions objecting to the Complaint.

Now, I know I have one matter in the Municipal Court next week——

Trial Examiner Myers: You are either going to come into it or you are not.

Mr. Gorman: We tried to come in once.

Trial Examiner Myers: What is your position as of this time?

Mr. Gorman: My position as of this time—it

may be that the employees do not want me to represent them on this particular matter.

Trial Examiner Myers: All right, I will give you until tomorrow morning to find out whether the group want you to represent them or not.

Mr. Gorman: I will take exception to the shortness of time.

Trial Examiner Myers: I am giving you this time to make up your mind as to whether or not you want to represent the group and give the group an opportunity to ascertain whether or not they want you to represent them. That is the only thing. I am giving you time to think whether you want to be retained in this matter.

Mr. Gorman: Normally, when a complaint is filed the responding party has a period of time in which to enter an appearance, or let it go by default. [318]

Trial Examiner Myers: I am not cutting off your time to enter an appearance. I am not cutting off your time to file an answer or make any motions with respect to the complaint as amended. I am just giving you time to consult with this group for two purposes:

One, for you to make up your mind whether you want to represent the group. Two, whether the group wants you to represent them.

Mr. Gorman: That is fine, providing that we are not limited to making an appearance by that date.

Trial Examiner Myers: I am not asking you to make an appearance. All I am trying to do is find

out whether the group want you to represent them and if you want to represent the group.

Mr. Gorman: I don't understand who they are represented by will affect this proceeding.

Trial Examiner Myers: Maybe, when we adjourn this hearing this afternoon, they will want Governor Warren to represent them.

Mr. Gorman: He would be a good man.

Trial Examiner Myers: And maybe they don't want you. Then again they might want you and you might not want to take the retainer. That is all. I am just giving you time to make up your mind, to consult with them to see whether you want to take the case or don't want to take the case. I am [319] not limiting your time to filing an answer or to making any motions, whatsoever, with respect to the complaint as amended.

With respect to Mr. O'Brien's motion to amend, I will take that under consideration and won't decide it until I hear further from you or your group as to their selection of counsel.

Mr. Gorman: All right then, may I be permitted to call Mr. O'Brien tomorrow?

Trial Examiner Myers: You can call Mr. O'Brien any time.

Mr. Gorman: How do you want the notification to take place?

Trial Examiner Myers: I will adjourn this hearing to reconvene at a certain hour tomorrow morning and let you come in and state on the record what your position is. What hour do you suggest? What about 10:00 o'clock?

Mr. Gorman: That is satisfactory.

Trial Examiner Myers: We will stand adjourned until 10:00 o'clock tomorrow morning.

(Whereupon, at 2:00 o'clock p.m., Wednesday, August 29, 1951, the hearing was adjourned until tomorrow, Thursday, August 30, 1951, at 10:00 o'clock a.m.) [320]

Trial Examiner Myers: Gentlemen, are you ready to proceed?

Mr. O'Brien: We are ready.

Mr. Orloff: We are ready.

Mr. Gorman: We are ready.

Trial Examiner Myers: What is the situation, Mr. Gorman?

Mr. Gorman: As of this morning, or yesterday evening at 4:00 o'clock, my people authorized me to go ahead as of this point.

Trial Examiner Myers: And you accepted the retainer?

Mr. Gorman: Yes, I have.

Trial Examiner Myers: Very well. I didn't quite understand your statement, Mr. O'Brien, that you are resting on the evidence that was introduced with respect to your Amended Complaint, that is, the 8(a)(2) allegations.

Are you going to resubmit that evidence?

Mr. O'Brien: Insofar as the relations of General Counsel and the respondent in this case are concerned, my motion, in effect, was really to amend the pleadings to conform to the proof. I make that introductory statement, Mr. Examiner.

I realize, of course, that the testimony taken in

the absence of the representatives of the Rehrig Employees Benefit Group is not binding upon them.

Trial Examiner Myers: It is not binding on the respondent [324] because it was not produced for the purpose of approving an 8(a)(2).

Mr. O'Brien: I have this suggestion. That whenever the transcript is available that counsel for the Group be permitted to read it, that I recall Mr. Gildart for any cross examination that any parties may wish to give, any explanations they wish of his testimony, and that the parties stipulate that the Examiner may consider the record as heretofore made in support of or in contradiction of the amendment to the Complaint.

Trial Examiner Myers: Without the stipulation that the evidence with respect to the 8(a)(2) allegation of the Complaint may be considered, I think you will have to reintroduce evidence with respect to that.

Mr. O'Brien: That is right. I intend to do so. In the absence of a stipulation I shall recall Mr. Gildart as my witness and interview him on the general lines of the testimony already given.

Trial Examiner Myers: I imagine what you meant to say is that that will be your evidence with respect to the 8(a)(2).

Mr. O'Brien: Yes, Mr. Examiner.

Trial Examiner Myers: Do you wish to be heard in opposition to the motion to amend the Complaint, Mr. Orloff?

Mr. Orloff: Not at this time. The only remarks

that I might make, I think I indicated yesterday afternoon. [325]

I am not prepared with any authority and I don't know whether I am going to find any. I don't know whether there is any.

This is a new matter for me, but just basing the situation and my statement upon experience in other fields of law, I would object to it on the grounds that it is a new cause of action and as such could not be introduced as an amendment to an existing complaint, which was filed sometime back and which is already on trial. I will object to it on that ground.

Trial Examiner Myers: What is your position, Mr. Gorman, as to the motion?

Mr. Gorman: I think I am in the same position as Mr. Orloff. I don't know too much about the law and the cases in this particular field, but it occurs to me—frankly, I don't understand the amendment.

Trial Examiner Myers: The amendment charges your client with being in existence in violation of the Act.

Mr. Gorman: As I read paragraph 12, line 3, it says here that the Rehrig Employees Benefit Group was interfered with and dominated by "the formation and administration of said labor organization."

As I read this it seems to me that it is saying that the company is guilty of an unfair labor practice in that they dominated and contributed, financially, and with other support to such labor organization, and such labor organization, in my [326] opinion, refers to the Rehrig Employees Group.

Trial Examiner Myers: That is right.